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Supreme Court, U.S.
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No. 00-1437

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IN THE

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

Cumberland Farms, Inc., *et al.*,
Petitioners

v.

Northeast Dairy Compact Commission
and
Daniel Smith, Commission Executive Director,
Respondents

On Petition For Writ of Certiorari
To the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Congress, by granting conditional approval to the Northeast Interstate Dairy Compact pursuant to the Compact Clause (U.S. Const. art. I, § 10, cl. 3), express its unequivocal consent to the Northeast Dairy Compact Commission's promulgation of regulations that place a substantial burden on commerce between the Compact region and out-of-Compact states in violation of the dormant Commerce Clause (U.S. Const. art. I, § 8, cl. 3)?

LIST OF PARTIES

Cumberland Farms, Inc. has no parent companies and no nonwholly owned subsidiaries. In addition to Cumberland Farms, Inc., the other parties joining in this Petition are New York State Dairy Foods, Inc., Crowley Foods, Inc., and Elmhurst Dairy, Inc.

New York State Dairy Foods, Inc. is an incorporated New York not-for profit trade association. It has neither parent companies nor nonwholly owned subsidiaries. Crowley Foods, Inc. is the subsidiary of Wessanen, N.V., a publicly held corporation organized under the laws of the Netherlands. Crowley Foods, Inc. has no nonwholly owned subsidiaries. Elmhurst Dairy, Inc. is a privately held New York Corporation. It has no parent companies and no nonwholly owned subsidiaries.

For ease of reference, this Petition will use "Cumberland" as the collective designation for all petitioners.

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PETITION FOR WRIT OF CERTIORARI

Cumberland Farms, Inc. ("Cumberland") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 30, 1999. Review by this Court of the Appeals Court's decision is in order for two independent but related reasons. First, the Court of Appeals decided an important question of federal law in this case that has not been, but should be, settled by this Court. Second, the Court of Appeals decided that important federal question in a way that conflicts with relevant decisions of this Court addressing similar federal questions.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit that gave rise to this petition is published as *Crowley Foods, Inc. v. Northeast Dairy Compact Commission*, 198 F.3d 1 (1st Cir. 1999) (Appendix A). The Memorandum and Order of the United States District Court for the District of Massachusetts, awarding summary judgment to the defendants is published as *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission*, 26 F. Supp. 2d 249 (D. Mass. 1998) (Appendix B). The Final Decision of the Northeast Dairy

Crowley Foods, Inc., Stewart's Processing Corp., Farmland Dairies, Inc. and Cumberland Farms, Inc., Docket Nos. HEP-97-001, 002, 004, and 005 (September 23, 1997) is reproduced in Appendix C.

JURISDICTION

By this Petition, Cumberland seeks review of the decision of the United States Court of Appeals for the First Circuit entered in this proceeding on November 30, 1999. No party filed a petition for rehearing in this matter following the entry of the First Circuit's opinion. Cumberland invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S. Const. art. I, § 8, cl. 3 (the "Commerce Clause") provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const. art. I, § 10, cl. 3 (the "Compact Clause") provides: " No State shall, without the

Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

Title 7 United States Code, Section 7526 (the conditional consent of the U.S. Congress to the Northeast Interstate Dairy Compact) is reproduced in Appendix D.

Senate Joint Resolution 28, 104th Cong. (1995), setting forth the text of the Northeast Interstate Dairy Compact, is reproduced in Appendix E.

Relevant portions of Title 7, Chapter XIII of the Code of Federal Regulations are reproduced in Appendix F.

STATEMENT OF THE CASE

Since 1937, the United States Secretary of Agriculture has regulated milk prices under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* (the "AMAA"). *Zuber v. Allen*, 396 U.S. 168, 172-79 (1969)(summarizing the history and structure of the federal milk pricing program). "The AMAA authorizes the Secretary of Agriculture to set the minimum prices that 'handlers' (milk processors) must pay to 'producers' (dairy farmers) for raw milk in

particular geographic areas." *New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 31-32. The Secretary carries out this regulatory authority by issuing Federal Milk Marketing Orders for designated regions of the country. These orders are regulations which, by economic formula, fix the monthly minimum price of milk in dollars and cents per hundredweight (a measure of weight abbreviated as "cwt" and equal to approximately 11 gallons of milk). The regulation of milk prices by federal order is not at issue in this case; however, the Federal Milk Marketing Order that covers most of New England is an important component of the Northeast Dairy Compact Commission regulations.

Independently of federal regulations, individual states have made persistent efforts to use milk regulation to insulate their own dairy farmers from the potentially harmful effects of competition with farmers from other regions of the country, where the costs of production and transportation may be lower. Because the intended effect of these regulations is inherently protectionist, however, state efforts to regulate milk to reduce the competitive advantage of out-of-state producers and processors have often fallen to legal challenges under the "dormant Commerce Clause" (U.S. Const. art. I, § 8, cl. 3). *E.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (Massachusetts milk regulations); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (Florida milk regulations); *Dean Milk Co. v. City of Madison*,

340 U.S. 349 (1951) (milk regulations enacted by local ordinance in Madison, Wisconsin); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) (New York milk regulations); *Baldwin v. G.A.F. Seelig, Inc.*, 249 U.S. 511 (1935)(New York milk regulations).

In spite of existing milk price regulations, the number of dairy farms in the Northeast has been in constant decline, though regional milk production has been about the same. Local concern about the loss of small family dairy farms gave rise to a renewed spate of state milk price regulations in the late 1980's and early 1990's. Using federal order minimum prices as a baseline, these new regulations set premiums, over and above the federal order minimum prices, to be paid by handlers on all fluid milk sold within the regulating state, regardless of the milk's point of origin. The regulated premiums were ordinarily collected through a state-administered fund, from which they were re-distributed to in-state dairy farmers based on their milk production. In this way, an impost on the sale of milk within the regulating state helped to subsidize the state's dairy farms without providing similar benefits to out-of-state farmers whose milk was also sold there. The Massachusetts version of this regulatory model was squarely rejected by this Court because it violated the dormant Commerce Clause. *West Lynn, supra; see also, Cumberland Farms, Inc. v. LaFaver*, 33 F.3d 1 (1st Cir. 1994) (following *West Lynn* in rejecting Maine's "impost - subsidy" regulatory scheme); *Marigold Foods,*

Inc. v. Redalen, 834 F. Supp. 1163 (D.Minn. 1993) (rejecting Minnesota's "impost - subsidy" regulatory scheme); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992) (invalidating New York's version of a milk price impost-subsidy).

Meanwhile, in 1988, Vermont began an effort to form an interstate compact with other Northeast states under the Compact Clause of the United States Constitution (art. I, § 10, cl. 3), in order to extend milk price regulations beyond its own state borders. *See Milk Industry Foundation v. Glickman*, 949 F. Supp. 882, 885 (D.D.C. 1996) (*aff'd.* 132 F.3d 1467) (describing history of Northeast Interstate Dairy Compact); *History of the Compact*, http://www.dairycompact.org/history.htm. In the end, only the six New England States (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut) subscribed to what became the Northeast Interstate Dairy Compact (the "Compact"). Congress gave *conditional* consent to the Compact in Section 147 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. § 7256).

Under the terms of the Compact, the participating states were to cooperate in the formation of the Northeast Dairy Compact Commission ("Commission"). The Commission is made up of representatives from states within the Compact region. It is empowered to promulgate milk price regulations for

application throughout the Compact region, without regard to state boundaries; however, nothing in the Compact itself expressly contemplates the Commission's regulation of milk prices in such a way as to discriminate economically against milk producers or processors located outside the Compact region.

When it approved the Compact, Congress expressed its intent that the Commission's power to regulate interstate commerce remain limited. It stipulated that: (a) "[t]he Northeast Interstate Dairy Compact Commission shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area in the United States," and (b) "[t]he Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose." 7 U.S.C. §7526(7). "Compensatory payments" refers to a type of discriminatory milk price regulation applied to out-of-region plants which this court, in *Lehigh Valley Coop. v. United States*, 370 U.S. 76 (1962), held was not authorized by Congress for use in the federal milk order program. In what was clearly an effort to preserve the Commission's regulatory authority *within* the Compact region, Congress added that "[e]stablishment of a Compact over-order price, *in itself*, shall not be considered a compensatory payment or a limitation or prohibition on the marketing of milk." *Ibid* (emphasis added).

In the face of Congress's specific prohibitions against interfering with the marketing of milk between the Compact region and other states, the Commission proceeded to promulgate milk price regulations that discriminated against milk processors located outside the Compact region in favor of processors located within the region. In 1997, the Commission promulgated a set of regulations establishing an over-order price on milk[1] sold in the Compact region. *See* 7 C.F.R. § 1305.1. Under the Commission's regulations, after handlers pay the over-order price into a "pool" (*see* 7 C.F.R. §§ 1304.1(a), 1306.1, 1306.2), the Commission arranges for the funds to be paid back through processors, according to a formula, to dairy farmers. 7 C.F.R. § 1307.2. How much is paid back, however, depends on whether the processor that ships the milk for sale within the Compact region is itself located within the region (in which case it is called a "pool plant") or outside the region (in which case it is called a "partially regulated plant"). 7 C.F.R. §§ 1304.5(c)(1), 1307.2(b)(1), 1307.4(f).

The Court of Appeals described the Commission's over-order price scheme succinctly as follows:

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[1] For purposes of the regulations at issue here, milk is classified according to its end use. "Class I" milk is milk sold at retail in fluid form. "Class II" and "Class III" milk is milk used to make other dairy products, such as cream, cheese, butter, and yogurt.

> The essence of the Commission's regulatory scheme is its "pooling mechanism." All handlers, whether pool plants or partially regulated ones, pay the same amount per hundredweight (cwt) into the pool, according to the volume of Class I milk purchased. *See* 7 C.F.R. § 1306.1. Thereafter, they receive rebates from the pool. *While pool plants receive a rebate based on the volume of all milk sold, whether Class I, II, or III, and whether sold in the Compact region or elsewhere, partially regulated plants receive payment based solely on Class I milk distributed in the Compact region. See* 7 C.F.R. §§ 1304.5(c)(1), 1307.4(f). These rebates are not retained by the plants, but rather are returned to the dairy farmers. *See New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 256-57 ("This money would be collected and commingled in the producer-settlement fund, along with all payment obligations of all other regulated handlers, for distribution to producers. The Commission would disburse from the pool to dairy farmers through the handlers, acting in a conduit capacity.").

Crowley Foods, Inc., 198 F.3d at 5 (emphasis added, footnote omitted). Except for the differential distribution of "rebates" to partially regulated (i.e., out-of-region) plants, the Compact pricing scheme operates much like the federal milk order system. It is the differential

rebate which frames the Commerce Clause issue in this case.

The District Court described the discriminatory *effect* of this regulatory construct using the following example (originally described by one of the plaintiffs, but not contested by the Commission), comparing a partially regulated plant located in New York to a pool plant located in New England:

> For July 1997, the Compact over-order Class I price was $16.94, $3.00/cwt above the federal Class I price. Under Compact rules, a New York and a New England plant each having 10 million pounds (100,000 cwts) of receipts from New York Dairy Farmers, with 80% Class I use (80,000 cwts) and equal distribution of packaged milk to New England (40,000 cwts) and New York (40,000 cwts) during the month of July, would have identical over-order obligations of $120,000 to the Compact pool for packaged milk distributed in New England. . . .
>
> The Commission would disburse from the pool to dairy farmers through the handlers, acting in a conduit capacity. The Commission calculated an "over-order producer price" (i.e., the amount to be paid back to the dairy farmers) of $1.28/cwt for July 1997. Whereas the New England pool plant would receive payment from the pool of $128,000 for

> redistribution to producers . . . the partially regulated New York plant would receive only $51,200 for redistribution . . . on some milk receipts . . . thus placing the New York handler at a $76,800 competitive disadvantage.

New York State Dairy Foods, Inc., 26 F. Supp. 2d at 256-57 (internal citations and footnotes omitted).

In short, this approach to rebating the pooled proceeds from the over-order premium means that producers who supply milk to pool plants (located within the boundaries of the Compact region) get back more pool money per unit of milk than do their counterparts who supply partially regulated plants (located outside the Compact region). The disparity serves as a powerful incentive for producers (wherever they may be located) to compete for the opportunity to supply pool (i.e., New England) plants, and to avoid the partially regulated plants located outside the Compact region. Since over 25% of raw milk supplying New England comes from New York dairy farms (63 Fed. Reg. 65517, 65518-19 (Nov. 27, 1998)), the differential distribution of the rebate, as described by the district court, created a very real and immediate disadvantage for New York processors (such as Cumberland) who must compete to procure milk supplies from the same New York farming regions.

Because of its negative impact on the competitive position of partially regulated plants, a number of processors operating partially regulated plants, including Cumberland, challenged the Commission's over-order price and its related rebate formula, as a violation of the dormant Commerce Clause and of the trade barrier proscription in Congress' conditional consent to the Compact.

In the first instance, the processors filed an action in the United States District Court for the District of Massachusetts seeking preliminary and permanent injunctive relief. Shortly after filing their District Court action, the plaintiffs in that case also served petitions on the Commission challenging the application of the over-order premium scheme to them. *See* 7 C.F.R. § 1381.4.

Ultimately, the parties to both proceedings agreed to stay the action in the United States District Court until the Commission had had an opportunity to act on the petitions. In September, 1997, the Commission issued its final decisions, rejecting all challenges to the Commission's regulatory scheme. The plaintiffs in the District Court action then amended their complaints to add direct challenges to the regulations and the Commission's decision.[2] On cross-motions for summary judgment, the

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[2] The basis for federal jurisdiction in the United States District Court for the District of Massachusetts was 28 U.S.C. §§ 1331, 1337 and 1343(a)(3), and 7 U.S.C. § 7256.

District Court rejected all of the plaintiffs' challenges to the Commission's over-order price regulations.

From the judgment of the District Court, there followed a timely appeal to the United States Court of Appeals for the First Circuit. In its November 30, 1999 opinion, that Court also rejected all challenges to the Commission's over-order price regulation and related rebates. Cumberland now seeks review of that opinion by this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS RESTS ON THE PREMISE THAT CONDITIONAL CONGRESSIONAL CONSENT (UNDER THE COMPACT CLAUSE) TO THE NORTHEAST INTERSTATE DAIRY COMPACT IS ADEQUATE CONSENT (UNDER THE COMMERCE CLAUSE) TO AN OTHERWISE INVALID REGULATION OF INTERSTATE COMMERCE BY THE NORTHEAST DAIRY COMPACT COMMISSION. WHETHER THE COMPACT CLAUSE AND THE COMMERCE CLAUSE, READ TOGETHER, SUPPORT THAT PREMISE IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In its decision below, the Court of Appeals considered congressional consent both to the establishment of the Northeast Interstate Dairy Compact[3] and to the Compact's regulation of interstate commerce.[4] The Compact Clause and the Commerce Clause address separate sets of important considerations underlying the constitutional allocation of powers between the federal government and the several states, and each demands attention to a separate set of details.

The Compact Clause requires congressional consent to interstate ventures "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 468 (1978) (*quoting Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)).

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[3] Under U.S. Const. art. I, § 10, cl. 3, " No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."

[4] The Commerce Clause provides that "Congress shall have power . . . to regulate commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. This affirmative grant of authority has been interpreted as a "self-executing limitation on the power of the states to enact laws imposing substantial burdens on such commerce." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). That limitation is known as the "dormant Commerce Clause." Only the express consent of Congress can save regulations of interstate commerce that would otherwise be impermissible under the dormant Commerce Clause. *Id.* at 87-88.

In explaining the historical and political imperatives behind requiring congressional consent for state burdens on interstate commerce under the dormant Commerce Clause, this Court has said:

> The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. It is not, as Alaska asserts, merely a wooden formalism. The Commerce Clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185, n. 2 (1938); *see also Southern Pacific Co. v. Arizona*, 325 U.S. at 767-768, n. 2. On the other hand,

> when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others.

South-Central Timber Development v. Wunnicke, 467 U.S. 82, 91-92 (1984).

The standard for establishing congressional consent to an interstate compact is relatively easy. *See State of Virginia v. State of West Virginia*, 78 U.S. 39, 59-60 (1870)(consent of Congress to an agreement between states may be given otherwise than in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto). The standard for establishing congressional consent to state regulation of interstate commerce, by contrast, is strict. *See Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982)(congressional consent to State regulation of interstate commerce must be "expressly stated").

Many interstate compacts that require congressional consent (including the Northeast Interstate Dairy Compact) involve regulation of commerce *among the states participating in the compact*. In such cases, congressional consent to the compact can fairly be said (within reason) to include consent to the compact's effect on commerce among those states. Where the compact presents the potential for regulation of commerce between the participating states and states outside the compact, however,

congressional consent to the compact cannot be deemed sufficient to authorize the regulation of interstate commerce unless Congress has affirmatively contemplated and unequivocally approved the otherwise invalid regulation. This is the necessary implication of long-established precepts of Compact Clause / Commerce Clause jurisprudence.

> Historically the consent of congress, as a prerequisite to the validity of agreements by states, appears as the republican transformation of the needed approval by the crown. But the constitution plainly had two very practical objectives in view in conditioning agreement by states upon consent of congress. For only congress is the appropriate organ for determining what arrangements between states might fall within the prohibited class of 'treaty, alliance, or confederation', and what arrangements come within the permissive class of 'agreement or compact.' *But even the permissive agreements may affect the interests of states other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions.*

Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution-A Study in Interstate Adjustments,* 34 Yale L.J. 685, 694-95 (1925) (emphasis added).

This Court has "final power to pass upon the meaning and validity of compacts." *Dyer v. Sims*, 341 U.S. 22, 28 (1951). It also has ultimate authority to determine whether Congress has consented to any single act of interstate commercial regulation by an entity other than Congress. *See, e.g., South-Central*, 467 U.S. at 90-92 (explaining the development of the Court's method of analysis in determining whether Congress has consented to what would otherwise be a violation of the dormant Commerce Clause).

Where (as in this case) an interstate compact commission asserts that congressional consent to a compact constitutes congressional consent to the commission's discriminatory regulation of trade between the compact region and other states, these powers of the Court intersect. The meaning and effect of the "consent" of Congress where the Compact Clause overlaps the dormant Commerce Clause is a question that implicates some of the most fundamental elements of the federal system of government, yet has not been addressed squarely by this Court. *Cf. U.S. Steel Corp.*, 434 U.S. 452 (1978) (considering whether *absence* of congressional consent to interstate compact rendered compact invalid, and whether compact commission regulations violated

dormant Commerce Clause); *Sporhase*, 458 U.S. at 959-960 (Congressional approval of interstate compacts for regulation of water rights "do[es] not indicate that Congress wished to remove federal constitutional constraints on such state laws.")(*dicta*).

Because this Court has not spoken on this important question of federal law, review of this case on writ of certiorari is in order.

II. THE ANALYSIS APPLIED BY THE COURT OF APPEALS IN DECIDING THAT CONGRESS CONSENTED TO THE NORTHEAST DAIRY COMPACT COMMISSION'S OVER-ORDER PRICE REGULATION SCHEME CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The impact of the Commission's regulations on out-of region (partially regulated) plants, as the district court found and the Commission conceded, is discriminatory. It places these plants at a clear competitive disadvantage. "State laws discriminating against interstate commerce are virtually per se invalid." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996)(internal quotation marks omitted). This discriminatory effect can stand only if Congress unequivocally consented to it, because Congress alone has the power to regulate interstate commerce. *South-Central*, 467 U.S. at 91. While Congress *did* grant the New England States conditional authority to enter the Compact, it *did not* consent unequivocally to the burden on interstate commerce created by the Commission's regulations.

The issue presented by this case, the location of the boundary between the authority of the federal government and the authority of the states to regulate interstate commerce in milk, is closely related to other important and fundamental questions of U.S. Constitutional law this Court has chosen to consider and decide. *See, e.g., Baldwin, supra* (rejecting New

York State milk regulations under the dormant Commerce Clause); *South-Central, supra* ("for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear"). The Court of Appeals has resolved the issue in a way that conflicts with these and other relevant decisions of this Court.

The standard for finding congressional consent is high. Congress's consent must be expressly stated or unmistakably clear and unambiguous before a federal statute will be read to permit or to approve what would otherwise be a violation of the dormant Commerce Clause. *See Sporhase*, 458 U.S. at 960; *South-Central*, 467 U.S. at 91; *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992). "A rule requiring a clear expression of approval by Congress . . . reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *South-Central*, 467 U.S. at 92.

The burden of demonstrating the clear and unambiguous intent of Congress to allow discrimination on interstate commerce to occur rests on the state that promulgates and enforces the discriminatory laws, or in this case, upon the Commission, the entity charged with administering the Compact. *Wyoming*, 502 U.S. at 458. The burden is heavy.

In *South-Central, supra*, for example, the Court rejected Alaska's argument that consent

to the state policy could be found because it paralleled federal policy. "The fact that the state policy in this case appears to be consistent with federal policy – or even that state policy furthers the goals we might believe that Congress had in mind – is an insufficient indicium of congressional intent." *South-Central*, 467 U.S. at 92.

In *Sporhase, supra*, Nebraska suggested that thirty-seven (37) statutes and several interstate compacts demonstrating that Congress had repeatedly deferred to state regulation of water demonstrated Congress' recognition of Nebraska's authority to restrain interstate water commerce. Even Congress's repeated prior express deference to states on water law matters was not enough to establish a clear congressional intent to let Nebraska burden interstate water commerce in that case.

In *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1981), a part of The Federal Power Act grandfathered the "lawful authority of the states" over the exportation of hydroelectric energy across state lines. The Court found that this part of the Act was not enough to demonstrate congressional consent to the state's burdening commerce, nor did any of the legislative history or any of the other language support Congress's intent to allow discriminatory interstate practices. 455 U.S. at 341. It rejected New Hampshire's invitation to glean the legislative intent from fragments of the

legislative history as "an exercise fraught with hazard." *Id.* at 342.

These decisions require a finding of unequivocal congressional consent to justify a state's discriminatory regulation of interstate commerce. To find the express, clear, unmistakable and unambiguous intent of Congress to consent to a burden on interstate commerce, the Court must construe the words of a statute as written and as the words were intended. *Ibid.* Therein lies the root of the Court of Appeals' deviation from the relevant precedents of this Court. In analyzing the intent of Congress with respect to the Commission's regulation of interstate commerce, the Court of Appeals said:

> Congress's command that "[t]he Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose" is not all Congress had to say on the matter. The next sentence states: "Establishment of a Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition on the marketing of milk." 7 U.S.C. § 7256(7). The Commission rightly urges that these two sentences read together mean that the Commission may do virtually anything (within the contemplation of the Compact) with

> respect to over-order pricing, short of compensatory payments.

Crowley Foods, Inc., 198 F.3d at 10. The Court of Appeals omitted from its analysis an additional relevant condition attached to congressional approval of the Compact. Congress also said "The Northeast Interstate Dairy Compact Commission shall not prohibit or in any way limit the marketing in the compact region of any milk or milk product produced in any other production area in the United States." 7 U.S.C. § 7256(7).

The appeals court's inference of congressional intent to authorize the Commission to promulgate any discriminatory milk price regulation with the exception of compensatory payments is simply not justified by the plain language of the Compact or the conditional consent of Congress. The unexpressed (but necessary) premise underlying the appeals court's reasoning is that Congress either: (1) believed it impossible to establish a Compact over-order price without placing an otherwise impermissible burden on interstate commerce, or (2) intended its consent to be broader than the plain meaning of its words. There is nothing in the record to support either proposition.

Congress did not say "any regulation that includes an over-order price is authorized under this Act." This would have rendered meaningless Congress' conditions to consent.

Instead, it said that establishment of a "Compact over-order price, *in itself*," would not violate the express congressional prohibition against compensatory payments and other limitations and prohibitions on the marketing of milk. 7 U.S.C. § 7256(7) (emphasis added). The Commission did not just establish an over-order price. It established an over-order price and combined it with a rebate scheme that discriminates against plants located outside the Compact region. Nothing in the language of the Compact or Congress's consent to it indicates that Congress contemplated the effect that the Commission's regulations (which did not exist when Congress consented to the Compact) would have on commerce between the Compact region and out-of-Compact states.

In sustaining the validity of the Commission's regulatory actions, the Court of Appeals decided that Congress had consented to whatever discriminatory regulation of interstate trade it had not expressly prohibited, rather than that the Commerce Clause prohibited every discriminatory regulation of interstate trade Congress did not expressly permit. That logical construct turns the relevant decisions of this Court upside down. *Cf., e.g., Sporhase*, 458 U.S. at 960 ("In the instances in which we have found [congressional] consent [to the unilateral imposition of unreasonable burdens in interstate commerce], Congress' intent and policy to sustain state legislation from attack under the Commerce Clause was expressly stated." (internal quotation marks and citations

omitted)); *South-Central*, 467 U.S. at 91 ("[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear.").

Once the Court of Appeals concluded that "the Commission may do virtually anything (within the contemplation of the Compact) with respect to over-order pricing, short of compensatory payments," its focus shifted away from the issue of congressional consent to whether the Commission's regulatory scheme established a "compensatory payment." *Crowley Foods, Inc.*, 198 F.3d at 10. It concluded that the Commission's over-order price regulations were not a compensatory payment system, because "under a compensatory payment system, the partially regulated plants would receive *no disbursements whatsoever* from the pool." *Ibid* (emphasis added). Since the partially-regulated (out-of-region) plants get at least *some* disbursement from the pool under the Commission's regulations, the appeals court reasoned, the over-order price payments mandated by the Commission did not amount to compensatory payments, and therefore were not expressly prohibited (*i.e.*, were permitted) by Congress. *Ibid.* By this reasoning, as long as the Commission's regulations require any part of a Compact over-order price, no matter how small, to be returned to partially regulated plants, the regulations are immune from challenge under the dormant Commerce Clause. Again, there is no indication in any of the plain language of the Compact or 7 U.S.C. § 7256

that Congress contemplated and expressly consented to anything of the sort.

This aspect of the decision by the Court of Appeals serves further to highlight that court's deviation from the relevant decisions of this Court. This Court's historical treatment of Commerce Clause challenges to state regulations is a study in the rejection of form-over-substance analysis. In *West Lynn*, this Court pointed out:

> Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case by case analysis of purposes and effects. As the Court declared over 50 years ago: "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 (1940); *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U. S., at 147 (1978); *see also Guy v. Baltimore*, 100 U.S. 430, 443 (1879) (invalidating discriminatory wharfage fees which were "mere expedient or device to accomplish, by indirection,

> what the State could not accomplish by a direct tax, viz., build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States"); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S., at 527 ("What is ultimate is the principle that one state in its dealings with another may not put itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement"); *Dean Milk Co., supra*, 340 U.S. at 354; *New Energy Co. of Indiana v. Limbach*, 486 U. S., at 275, 276 (invalidating reciprocal tax credit because it, "in effect, tax[es] a product made by [Indiana] manufacturers at a rate higher than the same product made by Ohio manufacturers. . .").

West Lynn, 512 U.S. at 201. The appeals court's inversion of the logical framework established by this Court for determining what burdens on interstate commerce Congress has approved led it to ignore this historical approach to substantive Commerce Clause analysis as well.

As the Court of Appeals noted, "Congress *could have* outlined the very regime the Commission implemented and approved it explicitly." *Crowley Foods, Inc.*, 198 F.3d at 11 (emphasis added). That, or something very much like it, is precisely what this Court has

previously required to support a finding of unequivocal consent. *E.g. New England Power Co.*, 455 U.S. at 343 (noting this Court's consistent requirement, in similar circumstances, that congressional intent be "expressly stated"). Admittedly, Congress could not have foreseen every possible regulatory action the Commission could have taken. But in the case of consent to discriminatory regulations on interstate commerce, this Court has made it abundantly clear that Congress must consent specifically before an otherwise impermissible regulatory act can be permitted to stand. Under the relevant decisions of this Court, Congress never consented to undisputed economic discrimination as embodied in the regulatory scheme the Commission adopted.

CONCLUSION

The petitioner, Cumberland Farms, Inc., urges this Court to grant the petition in this case, to decide the important federal question it presents, and to reverse the decision of the United States Court of Appeals for the First Circuit, which is in conflict with relevant decisions of this Court addressing related federal questions.

Respectfully Submitted

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 98-2370

NEW YORK STATE DAIRY FOODS, INC., ET AL.,

Plaintiffs, Appellants,

v.

NORTHEAST DAIRY COMPACT COMMISSION, ET AL.,

Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Patti B. Saris, U.S. District Judge]

Before

Selya, Circuit Judge,
Bownes, Senior Circuit Judge,
and Lipez, Circuit Judge.

Stuart I. Friedman, with whom Mary H. Dontzin, David O. Lloyd and Friedman, Wittenstein & Hochman, were on brief for Farmland Dairies, Inc., appellant.

Sheldon A. Weiss, for Cumberland Farms, Inc., appellant.

John J. Vetne, for New York State Dairy Foods, Inc., Crowley Foods, Inc., and Elmhurst Dairy, Inc., appellants.

Clifford M. Sloan, with whom Michael A. Rotker, Wiley, Rein & Fielding, and Dixie Henry, General Counsel, Northeast Dairy Compact Commission, were on brief for appellees.

November 30, 1999

BOWNES, Senior Circuit Judge. Appellants, New York State Dairy Foods, Inc.,

Crowley Foods, Inc., Cumberland Farms, Inc., Elmhurst Dairy, Inc., Farmland Dairies, Inc., Stewart's Ice Cream, Inc., Stewart's Processing Corp., and Sunnyvale Farms, Inc., appeal from the district court's grant of summary judgment on their challenges to certain regulations promulgated by appellee, Northeast Dairy Compact Commission ("Commission"), with Kenneth M. Becker, executive director of the Commission.[1] Appellants argue that the Commission exceeded its regulatory power under the Northeast Interstate Dairy Compact, that it violated the Dormant Commerce Clause, and that it violated their due process rights. For reasons stated below, we affirm.

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[1] See New York State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n, 26 F. Supp. 2d 249 (D. Mass. 1998).

I. FACTS

On this appeal from the grant of summary judgment in favor of appellees, we recite the facts in the light most favorable to the appellants. See Aponte Matos v. Toledo Davila, 135 F.3d 182, 185 (1st Cir. 1998); Acosta-Orozco v. Rodriguez-de-Rivera, 132 F.3d 97, 98 (1st Cir. 1997).

A. The Parties

Appellant New York State Dairy Foods, Inc. is a non-profit trade association representing New York milk processors and distributors of fluid milk products. It is joined by five fluid milk processors and distributors that procure raw milk from dairy farms outside of New England and distribute fluid milk in New England, and two New York processors that purchase raw milk from dairy farms outside of New England but do not distribute within New England.

Appellee, the Northeast Dairy Compact Commission, administers the Northeast Interstate Dairy Compact (the "Compact"),[2] an agreement entered into by the six New England states and approved by the Congress. *See* 1996 Farm Bill, 7 U.S.C. § 7256 (1996). The Commission's primary purpose is to regulate milk prices in the signatory states.

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[2] The Compact is reprinted in S.J. Res. 28, 104th Cong. (1995). We have included the resolution as an addendum to this opinion.

B. The Compact

Under the terms of the Compact, each state must appoint a delegation to the Compact Commission consisting of between three and five members. *See* Compact § 4. The delegation must include at least one dairy farmer and one consumer representative. *See id.* At the time this suit began, the Commission included directors of Women, Infants and Children's programs of various states, the Rhode Island Attorney General's Chief of the Consumer Protection Division, and state Agricultural Commissioners. Delegation members may not serve more than three consecutive terms, and no term may be more than four years. They may be removed from the Commission for cause. The delegation members' compensation is determined and paid by the individual states, although the Commission pays their expenses. *See* Compact § 4.

Historically, the dairy industry has been subject to extensive regulation by the federal government. Under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.* (1933), the Secretary of Agriculture may set minimum prices that milk "handlers" (processors) pay to "producers" (farmers) for raw milk. These "Federal Milk Marketing Orders" vary according to class of milk; the highest prices are charged for "Class I," fluid use milk. *See generally West*

Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 188-89 & n.1 (1994) (describing regulatory scheme). The primary purpose of the Compact is to set "over-order" prices in the Compact states, i.e., minimum prices at some level above those mandated by the federal pricing orders. *See* Compact §§ 2(8), 9(b).

The Commission exercises broad authority, through notice and comment rulemaking, to set minimum prices that processors pay for milk distributed within the Compact region. *See* Compact §§ 8-10. Each party state has a single vote, *see* Compact § 4, and price regulations must be approved by two-thirds of all party states. A state that dissents from a price regulation is not bound by it. *See* Compact § 5.

The Commission's over-order pricing power applies to two kinds of Class I milk processors: "pool plants" and "partially regulated plants." "Pool plants" are milk plants physically located within the Compact region.[3] "Partially regulated plants" are plants that, while located outside the regulated area, distribute Class I milk within the area, or receive milk from producers in the area.

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[3] The Commission could also establish a regulation covering only a subset of the Compact states; plants within that set would be pool plants. The Compact defines "regulated area" as "any area within the region governed by and defined in regulations establishing a compact over-order price or commission marketing order." *See* Compact § 2(5).

The Commission's powers with respect to minimum prices for pool plants and partially regulated plants are coextensive. *See* Compact § 9(d) ("The commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area.").

The terms of the Compact allow milk processors to object to the over-order price regulation. *See* Compact § 16(b). Handlers may file a written petition and request a hearing with the Commission. *See id.; see also* 7 C.F.R. §§ 1381.1-1381.4(f) (1997). The Chair of the Commission must appoint a hearing panel of one to three Commission members to pass on this petition. The panel must be composed of "Commission members who are not members of the state delegation in which the Handler is incorporated or has its principal place of business, who have no pecuniary interest in the outcome, and who are otherwise fair and impartial." 7 C.F.R. at § 1381.4(a). After considering the petition, the hearing panel issues a proposed decision, and, after considering handlers' objections, issues a ruling. *See id.* at §§ 1381.4(g)-(h). The Commission itself then reviews this ruling and issues its own decision. *See id.* The regulations further dictate that:

> Any commissioner shall (on either the Commissioner's own motion or on motion of the petitioner) disqualify

> himself or herself from consideration of the Commission's final ruling on the panel's decision if that commissioner's impartiality might reasonably be questioned.

See id. at § 1381.4(h)(3).

The essence of the Commission's regulatory scheme is its "pooling mechanism." All handlers, whether pool plants or partially regulated ones, pay the same amount per hundredweight (cwt) into the pool, according to the volume of Class I milk purchased.[4] *See* 7 C.F.R. § 1306.1. Thereafter, they receive rebates from the pool. While pool plants receive a rebate based on the volume of all milk sold, whether Class I, II, or III, and whether sold in the Compact region or elsewhere, partially regulated plants receive payment based solely on Class I milk distributed in the Compact region. See 7 C.F.R. §§ 1304.5(c)(1), 1307.4(f). These rebates are not retained by the plants, but rather are returned to the dairy farmers. *See New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 256-57 ("This money would be collected and commingled in the producer-settlement fund, along with all payment obligations of all other regulated handlers, for distribution to producers. The Commission would disburse from the pool to

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[4] A hundredweight of milk is 100 pounds of milk, or approximately 8.3 gallons.

dairy farmers through the handlers, acting in a conduit capacity.").

It is this rebate system that appellants claim disadvantages them. Appellants claim that New York dairy farmers receive a higher payback from, and therefore prefer to conduct business with, New England pool plants.[5] This, appellants assert, causes them to suffer competitive harm.

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[5] The district court offered an example of this effect that is worth repeating in its entirety:

Plaintiffs gave the following example of the different economic impact, which the Commission does not dispute. For July 1997, the Compact over-order Class I price was $16.94, $3.00/cwt above the federal Class I price. Under Compact rules, a New York and a New England plant each having 10 million pounds (100,000 cwts) of receipts from New York Dairy Farmers, with 80% Class I use (80,000 cwts) and equal distribution of packaged milk to New England (40,000 cwts) and New York (40,000 cwts) during the month of July, would have identical over-order obligations of $120,000 to the Compact pool for packaged milk distributed in New England. . . .

The Commission would disburse from the pool to dairy farmers through the handlers, acting in a conduit capacity. The Commission calculated an "over-order producer price" (i.e., the amount to be paid back to the dairy farmers) of $1.28/cwt for July 1997. Whereas the New England pool plant would receive payment from the pool of $128,000 for redistribution to producers . . . the partially regulated New York plant would receive only $51,200 for redistribution . . . on some milk receipts . . . thus placing the New York handler at a $76,800 competitive disadvantage. *New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 256-57 (internal citations and footnotes omitted).

II. PROCEEDINGS BELOW

A.. Issuance of the Regulation

On May 30, 1997, the Commission adopted an over-order price regulation effective from July 1, 1997, to December 31, 1997. *See* 7 C.F.R. §§ 1300-08, 1381 (1997). After the requisite notice in the Federal Register and subsequent public hearings, the six member states voted unanimously in favor of the regulation. Similarly, the regulation passed the producer referendum overwhelmingly. *See* Northeast Dairy Compact Commission, Results of Producer Referendum on Compact Over-Order Price Regulation, 62 Fed. Reg. 29,646, 29,647 (May 30, 1997).

The regulation established an over-order price of $16.94 per hundredweight. *See* Compact Over-order Class I Price and Compact Over-order Obligation, 7 C.F.R. § 1305.1 (1997). At the time of adoption, the federally mandated minimum price was $13.94, resulting in an over-order obligation of $3.00 per hundredweight. As the federal Class I price increased, the over-order obligation decreased in order to keep the net price constant at $16.94 per hundredweight. The Commission applied this over-order price regulation to all Class I fluid milk distributed within the regulated area, including milk produced and processed outside the region by partially regulated plants.

The over-order price regulation included an additional assessment of $.032 per hundredweight. The Compact explicitly grants this authority to the Commission to recover its administrative costs. *See* Compact § 18(a) ("[I]f regulations establishing an over-order price or a compact marketing order are adopted, they may include an assessment for the specific purpose of their administration."). The Commission applied this assessment to all fluid milk products distributed in the regulated area, whether by pool plants or partially regulated plants. *See* 7 C.F.R. § 1308.1 (1997).

B. The Administrative Petitions

On August 15, 1997, a subset of the instant appellants, led by Crowley Foods, Inc., filed administrative petitions (the "Crowley petitions") with the Commission that raised three variegated challenges, all of which are at issue in this appeal. First, they challenged the lawfulness of the pricing regulations. Second, they challenged the inclusion of a producer representative in each state's delegation to the Commission. Third, they challenged the participation on the Hearing Panel by any Commission member who had participated in promulgating the regulations under dispute. Finally, they challenged the imposition of the administrative assessments on out-of-region handlers.

In response to these challenges, the Chair of the Commission appointed three Commission members to serve as the hearing panel. The panel was comprised of the Chair, who was also the consumer representative from the Maine delegation, the Chief of the Consumer Protection Division of the Rhode Island Attorney General's Office, and the consumer representative from the New Hampshire delegation. *See New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 258. As the Commission's regulations require, none of the hearing panel members were from a state in which any petitioner was incorporated or has its principal place of business. *See id.*

The panel issued a Proposed Decision on September 9, 1997, recommending that the Commission deny the claims raised. Ten days later, the petitioners filed written objections. On September 23, the panel issued its Final Proposed Decision. The Commission adopted this final proposed decision by a 6-0 vote. *See id.* The Commission held that: (1) it has the authority to regulate (by imposing an over-order price and administrative assessment on all pool and partially regulated handlers) all milk distributed in the New England region, regardless of where it is produced; (2) application of the over-order pricing and pooling regulation to partially regulated plants does not constitute an impermissible compensatory payment scheme; and (3) the participation of New England farmers and processors in setting the over-order price does not, absent specific allegations of bias,

violate the Due Process Clause. *See New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 258, citing *In re Crowley Foods, Inc.*, Nos. HEP-97-001, -002, -004 & -005, at 9-20, 24-27.

Simultaneously, appellant Elmhurst Dairy, Inc., joined by Byrne Dairy, Inc., filed its own administrative petition (the "Elmhurst petition") raising claims similar to the Crowley petitions. In addition, the Elmhurst petition claimed that the pricing regulations were unlawful as applied to Elmhurst because its distribution within the regulated area was solely through an unaffiliated distributor. The Chair of the Commission appointed the same hearing panel that heard the Crowley petitions to hear the Elmhurst petition. On October 15, 1997, the panel once again issued a proposed decision recommending that the Commission reject all claims. The Elmhurst petitioners failed to file objections, and the proposed decision became final. On December 3, 1997, the Commission, again by a 6-0 vote, adopted the panel's recommendation and rejected all claims. It specifically rejected the claim that Elmhurst was not subject to the regulation because it found that the interposition of a third-party intermediary did not change the fact that Elmhurst "'operates a partially regulated plant that receives milk from producers providing the raw supply' for sales of packaged milk in the region." *New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 258 (citing *In re Elmhurst Dairy, Inc.*, Nos. HEP-97-007 & -008, at 8-9).

C. The District Court

Both the Elmhurst and Crowley petitioners sought review in the district court, under its equity jurisdiction, to determine whether the rulings of the Commission were "in accordance with law." *New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 259. Section 16(c) of the Compact grants such authority.[6]

The district court granted summary judgment in favor of the Commission, holding that:

(1) The Commission did not violate the Commerce Clause because Congress consented to the Commission's actions. *See New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 262.

(2) The Commission's actions did not violate Condition 7 of the congressional consent. *See id.*

(3) The administrative assessment contained in the over-order price regulation was squarely authorized by the Compact. *See id.* at 263.

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[6] In the course of the its grant of summary judgment, the district court found that the Commission was not an "agency" subject to the provisions of the Administrative Procedure Act, 5 U.S.C. § 551(1) (1998). Appellants do not challenge this ruling.

(4) Neither the composition of the hearing panel nor the composition of the Commission violated due process. *See id.* at 263-64.

(5) The plaintiffs were required to exhaust their administrative remedies on all claims before bringing them to the district court. *See id.* at 259.[7]

(6) The administrative assessment did not violate the Equal Protection Clause of the United States Constitution. *See id.* at 263.

(7) The Commission had authority to impose prices and assessments on Elmhurst Dairy, Inc., despite the fact that its only connection with the Compact is through an unaffiliated distributor. *See id.* at 265.

The several appellants challenge each of these rulings, save the last two, both of which appear to have been abandoned on appeal.

In addition, the district court entered an order approving an escrow account, in which any

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[7] Appellants challenge the district court's ruling on this point, arguing that the court erred in declining to accept extra-record evidence of competitive harm. We decline to reach the issue, as we concur with the district court that "none of the extra-record materials concerning the severity of any competitive harm appears [sic] relevant to the legal issues raised." *New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 259.

producer price payment from plaintiff-appellants would be deposited. *See New York State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n*, No. 97-11576-PBS (D. Mass. Aug. 14, 1997) (order approving escrow of funds).

III. STANDARD OF REVIEW

Our review of the district court's decision is *de novo*. *See Siegal v. American Honda Motor Co.*, 921 F.2d 15, 17 (1st Cir. 1990). This is equally true of both the due process claims, *see Dominique v. Weld*, 73 F.3d 1156, 1158 (1st Cir. 1998), and questions of statutory interpretation. *See United States v. George Hyman Constr. Co.*, 131 F.3d 28, 31 (1st Cir. 1997) ("We review *de novo* questions of statutory interpretation that present pure questions of law.").

IV. COMMERCE CLAUSE

Appellants launch a frontal assault on the over-order pricing regime (with its attendant pooling mechanism and administrative assessment) based on the Commerce Clause, or more precisely, on the so-called "Dormant Commerce Clause." *See* U.S. Const. art. I § 8; South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97 (1984); *United Egg Producers v. Department of Agric.*, 77 F.3d 567, 569-70 (1st Cir. 1996) ("The Supreme Court has interpreted this affirmative grant of authority to Congress as also establishing what has come to be called the Dormant Commerce Clause – a self-executing

limitation on state authority to enact laws imposing substantial burdens on interstate commerce even in the absence of Congressional action.").

Appellants' claim is based on the indisputable truism that "[s]tate laws discriminating against interstate commerce are virtually *per se* invalid." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (internal quotation marks omitted). As the Supreme Court wrote in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935):

> Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin.

Despite this seeming foundation of bedrock, appellants' Commerce Clause challenge is ultimately based on little more than shifting sand. This case, as distinct from *Baldwin* and the more recent *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (striking down state

milk pricing scheme as a violation of Commerce Clause), involves an affirmative congressional consent.

There can be no dispute in this case that Congress expressly consented to the Compact. *See* Northeast Interstate Dairy Compact, 7 U.S.C. § 7256 (1996) ("Congress hereby consents to the Northeast Interstate Dairy Compact . . . .") (hereinafter "the consent"). The question at issue is the scope of this consent.

A. Congressional Consent in General

Congress undoubtedly has the power to regulate milk prices, *see West Lynn Creamery*, 512 U.S. at 192 ("The Commerce Clause vests Congress with ample power to enact legislation providing for the regulation of prices paid to farmers for their products"), and can grant that power to the states, *see Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."). The relevant initial question, then, is not whether the Compact violates the Commerce Clause. Instead, the starting point of the inquiry is whether Congress consented to the actions of the Commission. We hold that Congress has provided such consent.

The standard for finding congressional consent is high. Such consent must be either

"expressly stated," *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982), or "made unmistakably clear," *South-Central*, 467 U.S. at 91. *See also United Egg Producers*, 77 F.3d at 570 (quoting both *Sporhase* and *South-Central*). The statute or legislative history relied on as consent must "evince[] a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (internal quotation marks omitted). The burden of showing consent lies with the Commission. *See Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) (imposing burden on discriminating state).

We are called, then, to decide whether Congress's consent grants the Commission the power to undertake the regulatory action at issue in this case. Because the consent altering the limits imposed by the Commerce Clause must be clear, our inquiry is limited to determining whether Congress spoke "directly . . . to the precise issue in question." *See Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

We have previously held that, in conducting this inquiry, "courts must look primarily to the plain meaning of the statute, drawing its essence from the particular statutory language at issue, as well as the language and design of the statute as a whole." *Strickland v. Commissioner, Dep't of Human Servs.*, 48 F.3d 12, 16 (1st Cir. 1995) (internal quotation marks

omitted). With this in mind, we consider appellants' specific claims seriatim.

1. Congressional Consent to Regulation of Handlers Outside the Region

Appellants first argue that the Compact and its attendant consent allows the Commission to regulate only those handlers who receive milk produced within the Compact region. We do not agree. The Compact specifically authorizes the Commission to regulate the "pricing and pooling of milk handled by partially regulated plants." Compact § 10(7). Under the terms of the Compact, a partially regulated plant is one that is not located within the regulated area but distributes Class I milk within such area, or receives milk from producers within the area. *See* Compact § 2(7). The Compact further provides that "[t]he Commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area." Compact § 9(d).

Appellants seize on this last provision, arguing that the lack of a serial comma after "partially regulated plants" and before "and all other handlers" suggests that the latter modifies the former. In other words, appellants contend that the Commission may only establish a minimum price for milk handled by a partially regulated plant when it receives milk from

producers located within the regulated area. The district court rejected this argument, noting that "[s]uch an interpretation would exempt from regulation those plants that meet the first half of the disjunctive definition of a partially regulated plant in section 2(7) of the Compact." *See New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 261. The district court found this construction to be contrary to the logic of the Compact, and we agree. Failure to construe the statute in this way would leave a gaping hole in the regulatory regime. *See United States v. Carroll*, 105 F.3d 740, 744 (1st Cir. 1997) ("Wherever possible, statutes should be construed in a commonsense manner, honoring plain meaning, and avoiding absurd or counter-intuitive results.") (internal citations omitted).

2. Condition 7

Appellants' better argument is based on Condition 7 of the congressional consent, which states: "The Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose." 7 U.S.C. § 7256(7) (1996). Appellants urge that the pooling mechanism utilized by the Commission in its over-order pricing regulation amounts to a compensatory payment, thus violating the congressional consent. The linchpin of this argument is that because the differential payments paid back to producers (through the handlers) depend on whether the handlers are

pool plants, the pooling mechanism is in effect a subsidy and compensatory payment which is a barrier to the entry of milk into the Compact region.[8]

Congress's command that "[t]he Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose" is not all Congress had to say on the matter. The next sentence states: "Establishment of a Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition in the marketing of milk." 7 U.S.C. § 7256(7). The Commission rightly urges that these two sentences read together mean that the Commission may do virtually anything (within the contemplation of the Compact) with respect to over-order pricing, short of compensatory payments.

Both the Commission and the district court distinguished between compensatory payments and pool payments. The former involves a system not unlike the pool method at issue in the instant case, save one crucial factor: under a compensatory payment system, the partially regulated plants would receive no disbursements whatsoever from the pool. *See* 7 C.F.R. §§ 1304.5(c)(1), 1307.4(f). This distinction

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[8] *See supra* note 5.

is vital, because it eliminates the primary objection to compensatory payments. A compensatory payment system forces handlers outside the pool to pay what amounts to a tariff upon entry into the regulated area. *See Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 83-90 (1962) (striking down a compensatory payment system and describing the above as the primary purpose and effect of a compensatory payment system); *see also New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 262 n.10 ("This description is consistent with the use of the term 'compensatory payment' in the case law cited by the plaintiffs.")(*citing Lehigh Valley Coop. Farmers, Inc.*, 370 U.S. at 82, and *Farmland Dairies v. McGuire*, 789 F. Supp. 1243, 1247-48 (S.D.N.Y. 1992)). The pool payment mechanism, on the other hand, does not bar the entry of milk from outside the Compact region. Rather, by allowing for payments back to the out-of-compact producers for Class I milk distributed inside the Compact region, the over-order price could be said to encourage the entry of such milk.

Admittedly, pool plants and partially regulated plants are not treated with absolute similitude; while pool plants receive a rebate based on the volume of all milk sold, whether Class I, II, or III, and whether sold in the Compact region or elsewhere, partially regulated plants receive payment based only on Class I

milk distributed in the Compact region. *See* 7 C.F.R. §§ 1304.5(c)(1), 1307.4(f).[9]

Even if there were to be some effect on entry of outside milk or some competitive disadvantage, the fact remains that Congress barred only the peculiar regulatory device of compensatory payments. From the language of the Compact, it appears that Congress distinguished between compensatory payments under § 10(6), which Congress barred, and "pricing and pooling of milk" under § 10(7), which Congress allowed.

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[9] To the extent that the appellants claim that the preference for pool plants violates the Equal Protection Clause, the district court deemed this claim inadequately raised. *See New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 263 n.11. For that reason, we refuse to review it here. *See Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992) ("If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal."). While we recognize that our decision in *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 627-29 (1st Cir. 1995), allows this Court the discretion to hear claims not raised below, we believe that this discretion is best used sparingly. There is simply too little to recommend this case as sufficiently exceptional to justify a departure from our long-standing raise-or-waive rule. *See id.* at 627 (describing this Court's adherence to the rule as "near-religious fervor").

We are left to conclude that Congress's language on the authority of the Commission to regulate via the pooling mechanism is clear. Admittedly, Congress could have outlined the very regime the Commission implemented and approved it explicitly. Congress's failure to do so, however, does not render its intent ambiguous. Cognizant of its inability to foresee every possible regulatory action, Congress chose to prohibit one action and allow all others.

3. Administrative Assessment

Appellants next argue that the Commission exceeded its authority (and therefore the scope of consent) by imposing an administrative assessment on all handlers distributing Class I milk in New England regardless of the point of origin of the milk. *See* 7 C.F.R. § 1308.1. We also reject this contention. The Compact explicitly gives the Commission the authority to include an administrative assessment as part of an over-order price regulation. *See* Compact § 18(a) ("[I]f regulations establishing an over-order price or a compact marketing order are adopted, they may include an assessment for the specific purpose of their administration."). Because the Commission's over-order pricing authority extends to partially-regulated plants, its assessment authority does as well.

B. Finding of Consent

Because we hold that in all respects the Commission acted pursuant to the terms of the congressional consent, we determine next whether that consent meets the high standard mandated by the Constitution.[10] *See Sporhase*, 458 U.S. at 960 (must be "expressly stated"); South-Central, 467 U.S. at 91 (must be "made unmistakably clear"). The failure of Congress to expressly state that the Commission may take the challenged actions is not fatal. As the Supreme Court stated in *South Central*:

> There is no talismanic significance to the phrase "expressly stated," however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated

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[10] Appellant Farmland Dairies argues that the Commission also violated Condition 2 of the Consent by regulating milk other than Class I milk. *See* 7 U.S.C. § 7256(2) (1996). Appellant admits that this point was not raised in the motion for summary judgment, but urges consideration of it nonetheless. *See* Appellant Farmland Dairies' Brief at 42 n.10. We decline to do so. *See supra* note 9.

> by the policies underlying dormant Commerce Clause doctrine.

South Central, 467 U.S. at 91-92.

In the instant case, there is no question that Congress affirmatively contemplated otherwise invalid state legislation. Congress explicitly consented to the Compact, marking in Condition 7 the boundaries of the Commission's power. This demonstrates conclusively that Congress read the Compact, and rejected one possible exercise of power, thereby approving the others contained therein.

This Court's decision in *United Egg Producers v. Department of Agriculture*, 77 F.3d 567 (1st Cir. 1996), is not inconsistent with our holding today. In that case, we considered a regulation by the Commonwealth of Puerto Rico that all eggs imported into Puerto Rico from the mainland United States bear a stamp showing the two-letter postal code of the state of origin. *See id.* at 569. Puerto Rico argued that Congress had consented to its action by stating: "[N]o State or local jurisdiction other than those in noncontiguous areas of the United States may require labeling to show the State or other geographical area of production or origin." 21 U.S.C. § 1052(b)(2), *as quoted in United Egg Producers*, 77 F.3d at 569. In considering whether this met the high standard of consent to state regulation of interstate commerce, we reasoned:

> One can argue that as Congress had before it the whole subject of egg-labeling, its exemption of noncontiguous jurisdictions must be understood to signify, by implication, Congressional approval of any and all egg-labeling requirements in those places regardless whether justified or unjustified by Dormant Commerce Clause considerations. But this seems to us a more extreme reading than either the statutory language or legislative history necessitates. Absent, at least, an affirmatively stated grant of permission to noncontiguous jurisdictions of the United States to require egg-labeling, we are unable to conclude that appellants have met their burden of showing that Congress' intent to allow Puerto Rico to enact protectionist egg-labeling regulations was "unmistakably clear."

United Egg Producers, 77 F.3d at 570-71 (footnotes omitted).

This case is fundamentally different. This is not a case in which an "affirmatively stated grant of permission" is lacking. Undoubtedly in part due to the peculiar nature of this case as one involving both the Dormant Commerce

Clause and the Compacts Clause,[11] Congress has provided affirmative consent; Congress read the Compact and approved it.[12] *See Central Midwest Interstate Low-Level Waste v. Pena*, 113 F.3d 1468, 1470 (7th Cir. 1997) (assuming that ratification of an interstate compact by Congress obviated the need for Dormant Commerce Clause scrutiny). Accordingly, *United Egg Producers*, while instructive, is not precisely apposite.[13]

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[11] U.S. Const. art. I § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . .").

[12] The states of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont, *as amici*, offer a similar argument. They argue that when an interstate compact becomes federal law under the Compacts Clause, it becomes immune from a Dormant Commerce Clause challenge by its very nature. They argue that the act of Congressional consent essentially transforms the States' agreement into federal law. Because we affirm on other grounds, we need not reach the merits of the Compacts Clause argument.

[13] Because we hold herein that Congress provided adequate consent to the Compact, we need not consider whether appellants were required to exhaust their administrative remedies before proceeding in the district court. The district court held that they were, and thus refused to hear evidence not in the administrative record documenting competitive harm to appellants. But as a result of our holding with respect to the Commerce Clause, no showing of harm could revive the Commerce Clause challenge.

V. DUE PROCESS

Appellants urge that the composition of both the Commission and the Hearing Panel violates the Due Process Clauses of both the Fifth and Fourteenth Amendments. They argue that the commissioners who are dairy farmers or handlers have a pecuniary interest in ruling and legislating against them.

A. In General

The Supreme Court has long held that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). This basic requirement applies in the context of administrative agencies. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

When an adjudicator has a direct, personal, and substantial pecuniary interest in the outcome of a case, due process is abrogated. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Not every interest, however, is substantial enough to amount to a violation of due process. In one formulation, an interest is substantial if it "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true . . . ." *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986). Participation of adjudicators who "might conceivably have had a slight pecuniary interest,"

however, does not offend due process. *See Aetna Life Ins. Co.*, 475 U.S. at 825.

The Due Process Clause sets a significantly lower bar for legislative functions. *Compare Londoner v. Denver*, 210 U.S. 373 (1908), *with* Bi-Metallic Inv. Co. *v.* State Bd. of Equalization, 239 U.S. 441 (1915); *see also Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 657 (1977) (Rehnquist, J., dissenting) ("As Mr. Justice Holmes recognized, the determination of legislative facts does not necessarily implicate the same considerations as does the determination of adjudicative facts.").

B. Legislative Functions

In *Friedman v. Rogers*, 440 U.S. 1 (1979), the Supreme Court considered a challenge to a statute establishing the Texas Optometry Board. Like the Commission, the Board was comprised of a pre-determined number of industry representatives. Four of the six members were so-called "professional opticians," and the remaining two slots were available to be filled by "commercial opticians." *See id.* at 6. The plaintiff, a commercial optician, challenged the regulation of his profession by a board whose membership (professional opticians) stood to gain directly by placing onerous restrictions on practice by their competitors. The Court rejected this claim, stating: "Although Rogers has no constitutional right to be regulated by a Board that is sympathetic to the commercial practice of

optometry, he does have a constitutional right to a fair and impartial hearing in any disciplinary proceeding conducted against him by the Board." *Id.* at 18. Finding the latter right not implicated, the Court upheld the statute.

Industry representation on regulatory boards is a common and accepted practice. *See id.* at 18 (upholding such a scheme); *Stivers v. Pierce*, 71 F.3d 732, 743 (9th Cir. 1995) ("[T]he system of industry representation on governing or licensing bodies is an accepted practice throughout the nation."); *Abramson v. Gonzalez*, 949 F.2d 1567, 1579 (11th Cir. 1992).

Friedman involved a statutory scheme that posed a far greater danger to due process than the one we are faced with here. In that case, a "schism," *Friedman*, 440 U.S. at 5, had arisen between commercial and professional opticians, and the professional opticians were, under the statutory scheme at issue, given significant power over their occupational rivals, *see id.* at 3-6. Despite this, the Supreme Court found no violation of the Due Process Clause. Accordingly, we are unable to hold that the composition of the Commission, without more, violates due process by allowing handlers and processors from Compact states to participate in the regulatory process. Not only has the Supreme Court approved a more problematic regulatory regime in *Friedman*, but we are not convinced that, given the significant attenuation of the commissioners' potential financial gain, their interest rises to the

level of substantiality required by *Tumey* and its progeny.[14]

C. Adjudicative Functions

The Due Process Clause inquiry is slightly more complicated with respect to the Hearing Panel. This is not, in contrast to the issuance of regulations, a mere legislative function. The Hearing Panel sits as a quasi-judicial adjudicative body, and thus must comport with a higher standard of due process. The Hearing Panel meets this standard for four reasons. First, any potential financial interest on the part of individual panel members is highly attenuated. *See Aetna Life Ins. Co.*, 475 U.S. at 825 ("slight pecuniary interest" on the part of the adjudicator does not violate due process). In order to "lead him not to hold the balance nice, clear and true[,]" *Ward*, 409 U.S. at 60, a panel member would have to be swayed by his own pro rata share in the additional profits (assuming that there are any) of a relatively tiny proportion of the Compact milk receipts. Partially regulated plants actually ship precious little milk into the region. *See* Compact Over-Order Price Regulation, 62 Fed. Reg. 23,039 (April 28, 1997) ("At present, approximately 98 percent of the fluid milk products consumed in the region are produced by fluid processing plants located in New England."). *See also* Joint Appendix at 160; *In re*

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[14] *See infra* Part V.C.

Petitions of Crowley Foods, Inc. Stewart's Processing Corp., Farmland Dairies, Inc., and Cumberland Farms, Inc., Nos. HEP-97-001, 002, 004, and 005, Final Decision of the Commission at 2, ¶ 5 ("Petitioners, in aggregate, supply approximately three percent of all packaged, Class I, fluid milk sales in the regulated area of the six New England states.").

The Ninth Circuit has commented on an arguably analogous situation. The court stated:

> A lawyer in a one-lawyer town, for example, would probably have a "direct" and "substantial" pecuniary interest in the licensing of a competitor planning to hang a shingle across the street. On the other hand, it is unlikely that any attorney practicing in a city like Los Angeles would have a competitive interest sufficiently strong to require that he be disqualified from considering the licensing of an additional lawyer.

Stivers, 71 F.3d at 743. We agree with the Ninth Circuit that at some level of attenuation, as here, the adjudicator's interest becomes too remote to have a constitutionally deficient effect.

Second, the Commission's own regulations provide a due process safeguard, placing

stringent restrictions on the composition of hearing panels. The regulations state:

> (a) Appointment of Commission hearing panel. Upon receipt of a petition, the Chair shall appoint from one to three Commission members who shall consider the petition . . . . The Commission panel chosen by the Chair shall consist of Commission members who are not members of the state delegation in which the Handler is incorporated or has its principal place of business, who have no pecuniary interest in the outcome, and who are otherwise fair and impartial.

Conduct of Proceedings, 7 C.F.R. § 1381.4(a). Pursuant to this, the Hearing Panel which heard appellants' petitions before the Commission did not include any handlers or farmers. As noted above, the Hearing Panel in this case consisted of the Commission Chair, who was also the consumer representative from the Maine delegation, the Chief of the Consumer Protection Division of the Rhode Island Attorney General's Office, and the consumer representative from the New Hampshire delegation. *See New York State Dairy Foods, Inc.*, 26 F. Supp. 2d at 258. Given the composition of the Hearing Panel in this case, it will take more than bare allegations to give rise to a finding of a deprivation of due process. We recognize that the composition of the hearing

panel does not fully answer appellants' complaint about the composition of the Commission as a whole. It is true that handlers and producers sit on the Commission, and as a result both issue initial regulations and pass on the Hearing Panel's proposed decisions. The issuance of regulations, as we have said, involves a lower due process bar. With respect to the final decision on the Hearing Panel's proposed decision, however, we need do little more than note that the full Commission adopted the proposed decision of this (unquestionably, we believe) disinterested panel.

Third, the Commission members vote as state delegations, not individual members. We recognize that this alone cannot cure a due process violation. *See Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970) (one biased member of even a sizable tribunal violates due process). It is not, however, without relevance. The possibility that the small number of handlers (with their already attenuated interest) on the Commission will influence their peers sufficiently to alter a vote is significantly more remote that it would be in a scheme in which each commissioner voted individually.

Fourth, and perhaps most important, the appellants could have moved to disqualify all handlers and farmers from the Commission decision on their petitions. *See* 7 C.F.R. § 1381.4(h)(3) ("Any commissioner shall (on

either the Commissioner's own motion or on motion of the petitioner) disqualify himself or herself from consideration of the Commission's final ruling on the panel's decision if that commissioner's impartiality might reasonably be questioned."). They did not do so.

Accordingly, there is no legal or factual basis for finding a due process violation.

VI. CONCLUSION

Finding that the Commission violated neither the Commerce Clause nor the Due Process Clauses, we *affirm* the district court's entry of summary judgment.

[Addendum omitted]

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NEW YORK STATE DAIRY FOODS, INC.; CROWLEY FOODS, INC.; CUMBERLAND FARMS, INC.; ELMHURST DAIRY, INC.; FARMLAND DAIRIES, INC.; STEWART'S ICE CREAM CO., INC.; STEWART'S PROCESSING CORP.; SUNNYDALE FARMS DAIRY, INC.; And BYRNE DAIRY, INC., Plaintiffs	CIVIL ACTION NO. 97-11576-PBS
v.	
NORTHEAST DAIRY COMPACT COMMISSION, and DANIEL SMITH, Commission Executive Director, Defendants.	

MEMORANDUM AND ORDER
November 2, 1998

Saris, U.S.D.J.

INTRODUCTION

This case concerns the pricing of milk distributed in New England. Plaintiffs challenge the regulations promulgated by defendant Northeast Dairy Compact Commission (the "Commission") on three grounds: (1) the pricing scheme, as applied to milk produced, processed and packaged outside of New England but sold to New England customers, constitutes unauthorized regulation of interstate commerce in violation of the Commerce Clause of the United States Constitution because Congress has not consented to such regulation with the requisite unmistakable clarity; (2) the additional administrative assessment imposed under the scheme conflicts with the Northeast Interstate Dairy Compact (the "Compact"); and (3) the participation of New England dairy farmers and processors in the promulgation and administrative review of pricing regulations in which they have a direct and substantial pecuniary interest violates the Due Process Clause.

The parties have cross-moved for summary judgment. After hearing and for the reasons set forth below, the defendants' motion for summary judgment is ALLOWED. The plaintiffs' motion for summary judgment is DENIED.[1]

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[1] The parties do not dispute that six of the plaintiffs are subject to the pricing regulations and have standing to challenge them and that this Court therefore has

I. BACKGROUND

The Court treats the following facts as undisputed, unless otherwise noted.

A. The Parties

Plaintiffs include: New York State Dairy Foods, Inc., a non-profit trade association representing New York milk processors and distributors of fluid milk products; five fluid milk processors and distributors that procure raw milk from dairy farms outside of New England and distribute fluid milk in New England; and two New York processors that purchase raw milk from dairy farms outside of New England but do not distribute within New England.[2] Plaintiffs compete in New York with

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jurisdiction to consider their challenges. Defendants move to dismiss, however, with regard to plaintiffs New York State Dairy Foods, Inc., Sunnydale Farms Dairy, Inc., and Stewart's Ice Cream Co., Inc., for lack of standing. Because I hold that the plaintiffs' claims fail on the merits, I need not reach defendants' motion to dismiss the complaint with respect to these three plaintiffs for lack of standing.

[2] The Amended and Supplemental Complaint describes the plaintiffs as follows.

New York State Dairy Foods, Inc., is an incorporated non-profit trade association representing the interests of New York milk processors and distributors of fluid milk products. Some member companies distribute fluid milk in New England, and most purchase raw milk from New York dairy farms.

Crowley Foods, Inc., owns and operates fluid milk processing and manufacturing plants in New York. Crowley purchases raw milk from dairy farms located outside of New England and distributes fluid milk in New England.

Cumberland Farms, Inc., owns and operates a fluid milk processing plant in New York. Cumberland purchases raw milk from dairy farms located outside of New England and distributes fluid milk in New England.

Elmhurst Dairy, Inc., owns and operates a fluid milk processing plant in New York. Elmhurst bottles milk for its own account and for other dealers. Elmhurst purchases raw milk from dairy milk farms located outside of New England. Fluid milk processed by Elmhurst is sold in New England by an unaffiliated customer, Bartlett Dairy, Inc., a dealer to which Elmhurst sells bottled milk.

Farmland Dairies, Inc., owns and operates a fluid milk processing plant in New Jersey. Farmland purchases raw milk from dairy farmers located outside of New England and distributes fluid milk in New England.

Stewart's Ice Cream, Co., Inc., operates retail convenience stores in New England and New York, which are supplied with fluid milk products by its corporate affiliate, Stewart's Processing Corp. Stewart's Ice Cream neither processes milk nor purchases raw milk from dairy farmers.

Stewart's Processing Corp. owns and operates a fluid milk processing plant in New York. Stewart's purchases raw milk from New York farmers and distributes packaged fluid milk products to stores in New York and Vermont.

Sunnydale Farms Dairy, Inc., owns and operates a fluid milk processing plant in New York. Sunnydale purchases raw milk from dairy farms located outside of New England. Sunnydale does not distribute fluid milk in New England.

Byrne Dairy, Inc., owns and operates fluid milk processing plants in New York. Byrne purchases raw

New England milk plants for raw milk supplies. Plaintiffs collectively account for approximately three percent of all sales of packaged fluid milk in New England.

The Commission is vested with authority to implement the Compact, which is set forth in section 1(b) of S.J. Res. 28, 104th Cong. (1995). In accordance with the terms of the Compact, the Commissi[illegible] is composed of "delegations" from each of the six participating New England states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. See Compact, § 4. Each state's delegation is comprised of three to five individuals and must include at least one dairy farmer and one consumer representative. *See id.* Each delegation is "entitled to one vote in the conduct of the Commission's affairs." *Id.*

B. Federal Regulation

The milk industry is subject to extensive federal regulation. The Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 601 et seq., ("AMAA") authorizes the Secretary of Agriculture to set the minimum prices that "handlers" (milk processors) must pay to "producers" (dairy farmers) for raw milk in particular geographic areas. These regulations are known as "Federal Milk Marketing Orders." The highest regulated

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milk from dairy farms located outside of New England and distributes fluid milk in New England.

Federal Milk Order prices are charged for "Class I" or "fluid use" milk, which is raw milk used for consumption (as opposed to milk used for manufacturing such dairy products as ice cream, yogurt, cheese and butter, which is characterized as Class II or Class III milk). *See generally West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 188-89 & n. 1, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) (describing the federal milk regulatory scheme). Because the AMAA establishes only the minimum prices that handlers must pay producers, "those prices have not been so high as to prevent substantial competition among producers" in neighboring states. *Id.* at 189, 114 S.Ct. 2205. Efforts by individual states to regulate prices paid to producers above the federal minimum have been invalidated as unduly burdening interstate commerce in violation of the Commerce Clause. *See id.* at 188, 194-96, 114 S.Ct. 2205 (invalidating a Massachusetts scheme that imposed premium payments on all Class I milk distributed in Massachusetts no matter where it was produced but that provided a subsidy offsetting the payments exclusively to Massachusetts dairy farmers).

C. The Compact

1. The Enactment

Against this backdrop of failed state regulatory efforts, several northeastern states sought congressional authority to enter into an

interstate agreement under the "Compact Clause" of the Constitution, U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State ....").

Between 1989 and 1993, the legislatures of the six New England states adopted the Northeast Interstate Dairy Compact, finding that "dramatic price fluctuations, with a pronounced downward trend, threaten the viability and stability of the northeast dairy region." Compact, S 1. Two of the six states--Vermont and Maine--are producer states, i.e., they produce more milk than they consume. The other four states--Massachusetts, Rhode Island, Connecticut and New Hampshire--are consumer states, i.e., they consume more milk than they produce. Although New York and Pennsylvania had participated in negotiating the terms and provisions of the Compact, neither state ultimately joined it.

On June 3, 1996, in the Federal Agriculture Improvement and Reform Act of 1996, Pub.L. No. 104-127, Title I, S 147, 110 Stat. 919 (codified at 7 U.S.C. § 7256), Congress consented to the Compact, which gave the Commission authority to regulate Class I (fluid use) milk. Congress attached seven conditions to its consent, the last of which is the linchpin of the current dispute:

> The Northeast Interstate Dairy Compact Commission shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area in the United States. The Compact Commission shall respect and abide by the ongoing procedures between Federal milk marketing orders with respect to the sharing of proceeds from sales within the Compact region of bulk milk, packaged milk, or producer milk originating from outside of the Compact region. The Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose. Establishment of a Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition on the marketing of milk.

7 U.S.C. § 7256(7).

In a colloquy concerning 7 U.S.C. § 7256, as part of the Senate Conference Report, Senator Leahy and Senator Lugar, Chairman of the Agriculture Committee, stated:

> This compact will allow the six New England states to regulate the price of all class I drinking milk sold in those States. The regulation may apply to any class I milk sold in the New England States but produced elsewhere, as well as to such milk produced by New England farmers. The compact also provides that farmers from beyond New England receive its benefits as well as their New England counterparts.

142 Cong. Rec. S3056 (1996). Senator Leahy and Senator Lugar also noted that congressional consent to the Compact did not "limit the compact commission's authority to establish a compact over-order price regulation for all fluid milk marketed into the compact region in any form, packaged or bulk, produced in another production region in the United States." *Id.* at § 3057. The President signed the legislation on April 4, 1996.

2. The Provisions of the Compact

The Compact authorizes the Commission to set an "over-order" price, which means a "minimum price required to be paid to producers for Class I milk established by the Commission in regulations adopted pursuant to sections nine and ten of this Compact, which is above the price established in federal marketing orders or by state farm price regulation in the

regulated area." Compact, § 2(8); *see also id.* § 9(b); 7 U.S.C. § 7256(2). This minimum price established by the Commission is the "price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area." Compact, § 9(d).

Under the Compact, "region" refers to "the territorial limits of the states which are or become parties to this compact."[3] *Id.* § 2(3). "Regulated area" is defined as "any area within the region governed by and defined in regulations establishing a compact over-order price." *Id.* § 2(5).

The Compact contains provisions regarding the regulation of both "pool" and "partially regulated" plants. A "pool plant" is "any milk plant located in a regulated area." *Id.* § 2(6). A "partially regulated plant" is "a milk plant not located in a regulated area but having Class I distribution within such area, or receipts from producers located in such area." *Id.* § 2(7).

Section 10 of the Compact, entitled "Optional Provisions For Pricing Order," provides, in relevant part:

> Regulations establishing a compact over-order price or a commission

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[3] Under the current federal order system, the New England "region" is governed by "Federal Milk Marketing Order 1."

marketing order may contain, but shall not be limited to, any of the following:

. . . . .

(5) Provisions for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered, or for the payment of producers delivering milk to the same handler of uniform prices for all milk delivered by them.

(A) With respect to regulations establishing a compact over-order price, the commission may establish one equalization pool within the regulated area for the sole purpose of equalizing returns to producers throughout the regulated area.

. . . . .

(6) Provisions requiring persons who bring Class I milk into the regulated area to make compensatory payments with respect to all such milk to the extent necessary to equalize the cost of milk purchased by handlers subject to a compact over-order price . . . . No such provisions shall discriminate against

> milk producers outside the regulated area. The provisions for compensatory payments may require payment of the difference between the Class I price required to be paid for such milk in the state of production by a federal milk marketing order . . . and the Class I price established by the compact over-order price ....
>
> (7) Provisions specially governing the pricing and pooling of milk handled by partially regulated plants.
>
> . . . . .
>
> (9) Provisions requiring the payment by handlers of an assessment to cover the costs of the administration and enforcement of such order pursuant to Article VII, Section 18(a).

Id. § 10(5)(A), (6)-(7), (9).

Before the Commission may invoke its regulatory authority, it must conduct an informal rulemaking proceeding, see id. S 11, publish notice of the proceeding in the official register of each participating state, *see id.*, consider specific criteria detailed in the Compact, *see id.* § 9(e), hold a public hearing, *see id.* § 11, and adopt, by a two-thirds majority of the delegations, *see id.* § 5, a written price

regulation. The rulemaking proceeding must comply with the requirements of § 553 of the federal Administrative Procedure Act. *See id.* §§ 5, 12; 5 U.S.C. § 553. Once the Commission adopts a regulation, that regulation will only apply to those states that vote affirmatively for it, see Compact, § 5, and the terms of any price must meet the approval of two thirds of all eligible producers by formal referendum, *see id.* § 13.

3. The Over-Order Price Regulation

On May 30, 1997, the Commission adopted an over-order price regulation effective for the six-month period between July 1, 1997, and December 31, 1997. 7 C.F.R. pts. 1300-08, 1381 (1997). In accordance with the Compact's provisions, the Commission published a Federal Register notice and conducted public hearings on the proposed regulation. The six member states voted unanimously in favor of the proposed price regulation, and the Commission conducted a producer referendum, which was passed overwhelmingly. *See* 62 Fed.Reg. 29,646, 29,647 (May 30, 1997).

The regulation established a combined federal Class I and Compact over-order price of $16.94 per hundredweight (cwt).[4] *See* 7 C.F.R. S 1305.1 (1997). The over-order obligation for covered handlers was $3.00 per hundredweight,

[4] A hundredweight of milk is approximately 8.3 gallons.

representing the difference between the announced Compact Class I price ($16.94) and the Federal Milk Marketing Order 1 price ($13.94). *See id.* The amount of the over-order obligation decreases as the federal Class I price increases. For example, between July and December 1997, the federal Class I price increased from $13.94 per hundredweight in July to $16.07 per hundredweight in December. The amount of the Commission's over-order obligation correspondingly declined 71%, from $3.00 per hundredweight in July to $0.87 per hundredweight in December. The Commission applied its over-order price regulation to all Class I fluid milk that was distributed within the regulated area, including milk that was produced and processed outside the region by partially regulated plants.

The Commission also included an additional assessment in the over-order price regulation, pursuant to section 18(a) of the Compact. Section 18(a) provides:

> To provide for its start-up costs, the commission may borrow money pursuant to its general power under section six, subdivision (d), paragraph four. In order to finance the costs of administration and enforcement of this compact, including payback of start-up costs, the commission is hereby empowered to collect an assessment

> from each handler who purchases milk from producers within the region.... *In addition, if regulations establishing an over-order price or a compact marketing order are adopted, they may include an assessment for the specific purpose of their administration.* These regulations shall provide for establishment of a reserve for the commission's ongoing operating expenses.

Compact, § 18(a) (emphasis added); *see also id.* § 10(9). The assessment is $0.032 per hundredweight, calculated by the Commission based on the quantity of fluid milk products disposed in the regulated area from a pool or partially regulated plant. *See* 7 C.F.R. § 1308.1 (1997).

According to the Commission, plaintiffs Byrne Dairy, Inc., Crowley Foods, Inc., Cumberland Farms, Inc., Elmhurst Dairy, Inc., Farmland Dairies, Inc., and Stewart's Processing Corp., as 'covered handlers' under the regulations, are subject to the over-order payment obligation, inclusive of the over-order assessment. *See id.* §§ 1301.6, 1301.9. The first payment was due on or before August 19, 1997. *See id.* § 1307.3(a). [5]

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[5] In October 1997, the Commission voted to extend its price regulation of $16.94 per hundredweight for the period of January 1, 1998, through termination of the

4. The Pooling Scheme

The Commission's milk regulations authorizing it pertinent on the principle of "pooling." *See* Compact, §§ 2(6), 9(1), (4), 10(5)(A), (7); 7 C.F.R. pts. 1306-07. Under the Commission's regulations, the proceeds from the Class I over-order price surcharge are pooled into a "producer settlement fund" by the Commission. 7 C.F.R. § 1307.1. These proceeds are then redistributed, in the form of a Compact "over-order producer price," to regulated handlers for disbursement to producers who provided them with raw milk. *Id.* §§ 1306.3, 1307.6. As the Commission has concluded that regulation of both "pool" plants and "partially regulated" plants is contemplated by the terms of the Compact, both are made subject to the over-order price regulation and resultant pooling scheme. *See id.* §§ 1306.1, 1306.2. Pooling these public payments from the pool to all producers who provided the milk, regardless of their location, that is, payment of the Compact over-order producer price is made to all dairy farmers supplying pool plants and partially regulated plants. *See id.* §§ 1301.11, 1307.6.

Although the payment obligation into the pool is the same for pool and partially regulated

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Commission's authority under the Compact, which is governed by 7 U.S.C. § 7256(3).

plants, the amounts that the two types of plants receive for redistribution to out-of-region producers are not necessarily equal. Plaintiffs gave the following example of the different economic impact, which the Commission does not dispute. For July 1997, the Compact over-order Class I price was $16.94, $3.00/cwt above the federal Class I price. Under Compact rules, a New York and a New England plant each having 10 million pounds (100,000 cwts)[6] of receipts from New York dairy farmers, with 80% Class I use (80,000 cwts) and equal distribution of packaged milk to New England (40,000 cwts) and New York (40,000 cwts) during the month of July, would have identical over-order obligations of $120,000[7] to the Compact pool for packaged milk distributed in New England. This money would be collected and commingled in the producer-settlement fund, along with all payment obligations of all other regulated handlers, for distribution to producers.

The Commission would disburse from the pool to dairy farmers through the handlers, acting in a conduit capacity. The Commission calculated an "over- order producer price" (i.e., the amount to be paid back to the dairy farmers) of $1.28/cwt for July 1997. Whereas the New

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[6] A hundredweight (cwt) is equivalent to 100 pounds. Thus, 10 million pounds is 100,000 cwts.

[7] The calculation is 40,000 cwts (the volume of packaged milk that the plant distributed in New England during July) x $3.00 over-order obligation. *See* 7 C.F.R. §§ 1306.1, 1306.2 (1997).

England pool plant would receive payment from the pool of $128,000 for redistribution to producers (i.e., $1.28 over-order producer price x total milk receipts of 100,000 cwts), the partially regulated New York plant would receive only $51,200 for redistribution (i.e., $1.28 x 40,000 cwts) on some milk receipts, *see* 7 C.F.R. §§ 1304.5(c)(1), 1307.4(f) (1997), thus placing the New York handler at a $76,800 competitive disadvantage.

Differential redistributions inure to the benefit of producers supplying pool plants because the Compact over-order producer price is uniformly disbursed to all milk producers who provided milk to a pool plant. *See In re Elmhurst Dairy, Inc.*, Nos. HEP-97-007 & -008, at 5. Revenues to be disbursed to these producers are based upon the pool plant's total volume of milk receipts, including milk that is diverted elsewhere for production of manufactured dairy products. By contrast, partially regulated plants receive no revenues for the volume of any packaged milk sold outside of the regulated area or for the volume of milk used for manufacturing. Instead, revenues are based on the partially regulated plant's volume of fluid milk distribution in New England only and are disbursed to producers on a pro rata basis accordingly. *See id.* Because payments from the pool to partially regulated plants are calculated by multiplying the over-order producer price and the receipts destined for Class I milk distribution in New England, the

partially regulated plant that diverts some milk to out-of-region plants or for non-fluid use will receive less money for redistribution to producers than similarly situated pool plants. Accordingly, plaintiffs claim that they suffer competitive harm because New York dairy farmers prefer to deal with New England pool plants, which give them a higher payback. This is the beef that generated this suit.

D. Administrative Proceedings

The Compact sets forth the procedures available to handlers who object to the over-order price. *See* Compact, § 16(b). Handlers may file a written petition with the Commission, which triggers the Commission's administrative process, and may request a hearing at that time. *See id.*; *see also* 7 C.F.R. §§ 1381.1-1381.4(f) (1997). In accordance with Commission regulations, the Chair of the Commission appoints a "Hearing Panel" of one to three Commission members; the Panel must be composed of Commission members "who are not members of the state delegation in which the Handler is incorporated or has its principal place of business, who have no pecuniary interest in the outcome, and who are otherwise fair and impartial." *Id.* § 1381.4(a). The Hearing Panel considers the petition, issues a proposed decision, considers any handler objections thereto, and then renders a final proposed decision. *See id.* § 1381.4(b)-(g). The Hearing Panel's final proposed decision, together with

any handlers' objections, is then considered by the Commission, which issues a final ruling on the petition. *See id.* § 1381.4(h). The Commission's regulations provide that "[a]ny commissioner shall (on either the Commissioner's own motion or on motion of the petitioner) disqualify himself or herself from consideration of the Commission's final ruling on the panel's decision if that commissioner's impartiality might reasonably be questioned." *Id.* § 1381.4(h)(3).

E. Crowley Petitions

On August 15, 1997, plaintiffs Crowley Foods, Inc., Farmland Dairies, Inc., Cumberland Farms, Inc., and Stewart's Processing Corp. filed verified administrative petitions (collectively, the "Crowley petitions") with the Commission challenging the lawfulness of the pricing regulations, the requisite producer representation on each state's delegation, the participation on the Hearing Panel of any Commission member who had participated in promulgating the regulations at issue, and the imposition of administrative assessments on out-of-region handlers.[8]

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[8] In July 1997, eight of the nine plaintiffs had moved for a preliminary injunction to prohibit the Commission from enforcing the over- order price regulation. On August 7, 1997, plaintiffs Crowley Foods, Inc., Farmland Dairies, Inc., and Stewart's Processing Corp. entered into a written agreement with the Commission whereby they consented to withdraw their pending request for

On August 19, 1997, the Chair of the Commission appointed three Commission members to serve as the Hearing Panel for these petitions. The three appointees were the Chief of the Consumer Protection Division of the Rhode Island Attorney General's Office, the consumer representative from the New Hampshire delegation, and the Chair of the Commission, who was also the consumer representative from the Maine delegation. In accordance with the Commission's regulations, none of the three appointees is from a state in which any petitioner is incorporated or has its principal place of business. On September 9, 1997, the Hearing Panel issued its Proposed Decision on the Crowley petitions, recommending that the Commission deny plaintiffs' claims. On September 19, the Crowley petitioners filed written objections to the Proposed Decision. On September 23, the Hearing Panel issued its Final Proposed Decision.

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injunctive relief, to pay their over-order obligations into a court registry account, and to file administrative petitions with the Commission. The Commission agreed to issue expedited decisions on the administrative petitions. Meanwhile, the remaining plaintiffs, with no known payment obligations, continued with their request for a preliminary injunction.

On August 13, 1997, this Court issued an order denying the motion for preliminary injunction. *See New York State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n*, No. 97-11576-PBS, Order at 3-4 (D.Mass. Aug.13, 1997).

On September 25, the Commission met and, by a vote of 6-0, adopted the Panel's Final Proposed Decision on the petitions. Later that same day, the Commission issued its Final Decision, rejecting plaintiffs' objections and concluding that: (1) the Commission has the authority to regulate (by imposing an over- order price and administrative assessment on all regulated handlers) all milk distributed in the New England region, including milk that is produced and/or processed outside of the region by partially regulated plants; (2) the application of the over-order pricing and pooling regulation to partially regulated plants does not constitute an impermissible compensatory payment scheme; and (3) the participation of New England farmers and processors in setting the over-order price does not, absent specific allegations of bias, violate the Due Process Clause. *See In re Crowley Foods, Inc.*, Nos. HEP-97- 001, -002, -004 & -005, at 9-20, 24-27.

F. Elmhurst Petitions

Meanwhile, plaintiffs Elmhurst Dairy, Inc., and Byrne Dairy, Inc., filed verified administrative petitions (collectively, the "Elmhurst petitions") challenging most of the same Commission activities and regulations as did the Crowley petitions. Plaintiff Elmhurst raised the additional claim that imposition of the pricing regulations on it was unlawful because its distribution in the region occurred solely through an unaffiliated distributor. On

September 25, 1997, the Chair of the Commission appointed the same Hearing Panel as had served on the Crowley petitions. On October 15, 1997, the Panel issued its Proposed Decision on the Elmhurst petitions, recommending that the Commission deny all claims. The Elmhurst petitioners did not file objections, and the Proposed Decision became the Panel's Final Decision. On December 3, 1997, the Commission adopted the Panel's Final Decision by a vote of 6-0. Later that same day, the Commission issued its Final Decision on the petitions, rejecting plaintiffs' claims as it had done in the Crowley decision. The Commission also rejected Elmhurst's additional claim that it was not subject to the Commission's regulatory authority because the fluid milk that it packaged for distribution in the New England region was distributed by an unaffiliated distributor. The Commission reasoned that the involvement of a third-party intermediary does not change the fact that Elmhurst "operates a partially regulated plant that receives milk from producers providing the raw supply" for the sales of packaged milk into the region. *In re Elmhurst Dairy, Inc.*, Nos. HEP-97-007 & -008, at 8-9.

II. DISCUSSION

A. Standard of Review

Plaintiffs seek judicial review of the Commission's final decisions on the Crowley and Elmhurst petitions. This Court has jurisdiction in equity to determine whether the rulings of the Commission are "in accordance with law." Compact, § 16(c). [9]

B. Exhaustion

Although the parties have cross-moved for summary judgment pursuant to Fed.R.Civ.P. 56(c), this Court must determine whether the present proceeding is more appropriately considered judicial review of an agency rulemaking based on the administrative record of proceedings conducted by the Commission pursuant to Compact, § 16(c). In particular, the Commission argues that this Court should not consider any extra-record submission by the plaintiffs documenting competitive harm. The

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[9] The Administrative Procedure Act ("APA") defines "agency" as "each authority of the Government of the United States." 5 U.S.C. § 551(1). Here, the Commission is an authority created by an interstate compact among six states with congressional consent. Neither plaintiffs nor defendants argue that the Commission is an agency subject to APA provisions, except as provided by the Compact itself. Because section 16(c) of the Compact does not specifically reference the judicial review standards in the APA, 5 U.S.C. § 706, the Court concludes that these standards are inapplicable.

resolution of this issue hinges, in part, on whether exhaustion is required.

The "general rule" is that parties are required to exhaust prescribed administrative remedies before seeking relief from the courts because exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 144-45, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992). With respect to promoting judicial efficiency, exhaustion of the administrative procedure "may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual contest." *Id.* at 145-46, 112 S.Ct. 1081; *see also Swirsky v. National Ass'n of Sec. Dealers*, 124 F.3d 59, 63 (1st Cir.1997) ("Exhaustion is required if explicitly mandated by Congress, but courts may relax this requirement somewhat where Congress is silent." (citation omitted)). Exhaustion may not be required, however, "where the pursuit of administrative remedies would be futile or inadequate," would "waste resources," and would "work severe irreparable harm on the litigant," or "when the issues raised involve purely legal questions." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 190 (1st Cir.1993).

The Commission contends that plaintiffs may not raise any unexhausted claim and that judicial review is limited to review of the Commission's final decisions based on the

record it had before it. The Compact provides that an aggrieved handler subject to an order "may file a written petition with the commission" claiming that the order is "not in accordance with law." Compact § 16(b) (emphasis added). Section 16(c) provides for federal jurisdiction to review "such ruling" of the Commission on this petition. *Id.* § 16(c). Plaintiffs argue that the use of the permissive word "may" in section 16(b) suggests that Congress did not mandate exhaustion and that this Court should not simply conduct judicial review of an administrative record. However, the word "may" simply connotes that the handler has the option of challenging the order by filing a petition rather than, for example, awaiting an enforcement action. Federal jurisdiction is triggered by a challenge to the Commission's ruling on a petition. Here, the Court concludes that exhaustion is required and that it should review the pricing regulations and other agency rules based on the administrative record before the Commission in order to determine whether the rulemaking was in accordance with law.

As a practical matter, the difference between a review pursuant to Fed.R.Civ.P. 56(c) and an administrative review is not important here because none of the legal challenges turns on questions of fact and none of the extra-record materials concerning the severity of any competitive harm appears relevant to the legal issues raised.

C. Statutory Construction

The United States Supreme Court has recently reiterated the standard by which courts must review challenges to interstate compacts consented to by Congress:

> As we explained long ago, once a compact between States has been approved, ... it is the law of the case binding on the states and its citizens, as fully as if it had been never contested. Indeed, congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States. Just as if a court were addressing a federal statute, then, the first and last order of business of a court addressing an approved interstate compact is interpreting the compact. [U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite.

New Jersey v. New York, 523 U.S. 767, ----, 118 S.Ct. 1726, 1750, 140 L.Ed.2d 993 (1998) (alterations in original) (internal quotations and citations omitted).

This Court is also guided by the equally well-settled principles governing judicial review of an agency's construction of a statute:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (footnotes omitted). The First Circuit elaborated on the two-stage *Chevron* analysis:

> In performing the first part of a *Chevron* analysis, no deference is due. Instead, courts must look primarily to the plain meaning of the statute, drawing its essence from the "particular statutory language at issue, as well as the language and design of the statute as a whole." Beyond this point, it remains unclear whether, and if so, to what extent, a court engaged in the first stage of a *Chevron* inquiry may use other tools of statutory construction, such as legislative history, in searching for Congress' unambiguously expressed intent on a particular issue.

Strickland v. Commissioner, Me. Dep't of Human Servs., 48 F.3d 12, 16-17 & n. 4 (1st Cir.1995) (citations omitted) (assuming that a court may look at legislative history at the initial stage, and noting that courts "may well decide to consider it during the second stage in order to determine whether the agency's interpretation is a permissible one").

Although "[a]n agency's formal interpretation, through a rulemaking or an adjudication, of a statute that it administers, is accorded what has come to be known as *Chevron* deference," *Massachusetts v. FDIC*, 102 F.3d 615, 621 (1st Cir.1996), no deference is due if Congress has spoken directly to the

question, *see Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 793 (1st Cir.1996). With these principles in mind, the Court turns to the three legal challenges raised by the plaintiffs.

D. Commerce Clause

Plaintiffs primarily challenge the pricing regulations on the ground that the Commission exceeded its regulatory authority in violation of the Commerce Clause, Article I, Section 8 of the United States Constitution. Plaintiffs claim that the Commission lacks authority to regulate Class I milk produced, processed and packaged outside of New England but distributed within New England.

"The Commerce Clause vests Congress with ample power to enact legislation providing for the regulation of prices paid to farmers for their products." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994). Although the "negative" aspect of the Clause limits a state's power to adopt regulations that discriminate against interstate commerce, *see id.*, "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 174, 105 S.Ct. 2545, 86 L.Ed.2d 112 (1985).

Because of the importance of the constitutional prohibition against economic

protectionism, any congressional exemption from the limitations of the Commerce Clause must be crystal clear. *See United Egg Producers v. Department of Agric.*, 77 F.3d 567, 570 (1st Cir.1996) ("The standard for finding Congressional consent is ... high."). The state has the burden of demonstrating the unmistakably clear intent of Congress to allow otherwise discriminatory regulations. *See Wyoming v. Oklahoma*, 502 U.S. 437, 458, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992). Accordingly, the Commission has the burden of demonstrating congressional consent to the economic protectionism of the Compact's regulations.

The Commission points to three provisions of its Compact as authority for its regulation of milk produced, processed and packaged outside of the region but distributed within it: sections 10(7), 2(7) and 9(d). The Compact authorizes the Commission to regulate "the pricing and pooling of milk handled by partially regulated plants." Compact, § 10(7). A "partially regulated plant" is, in turn, defined as "a milk plant not located in a regulated area but having Class I distribution within such area, or receipts from producers located in such area." Id. § 2(7) (emphasis added). Section 9(d) provides that "[t]he commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers

located in a regulated area." Id. § 9(d) (emphasis added).

Plaintiffs argue that the Compact itself is not unmistakably clear. Contending that the phrase "receiving milk from producers located in a regulated area" modifies "pool plants" and "partially regulated plants" as well as "all other handlers," plaintiffs interpret section 9(d) to permit the Commission to regulate only those handlers receiving milk produced in New England. Although better comma placement would have been helpful, the lack of a comma after "partially regulated plants" is not dispositive. Such an interpretation would exempt from regulation those plants that meet the first half of the disjunctive definition of a partially regulated plant in section 2(7) of the Compact. This construction would be nonsensical and contrary to the logic of the Compact. *Cf. United States v. Carroll*, 105 F.3d 740, 744 n. 3 (1st Cir.1997) (discussing the court's power to repunctuate "to render the true meaning of a statute" (*quoting United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 462, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993))), *cert. denied*, --- U.S. ----, 117 S.Ct. 2424, 138 L.Ed.2d 187 (1997). Plaintiffs' stronger argument is that the over-order pricing scheme, as applied to partially regulated plants, is unlawful because such regulations require "compensatory payments" under the Compact and "limit" the marketing of milk produced in other areas, both of which Congress explicitly

prohibited in its consent to the Compact, *see* 7 U.S.C. § 7256(7). Plaintiffs contend that any form of provision of a milk marketing order that imposes financial obligations upon partially regulated plants for the sale within the regulated area of out-of-region milk constitutes a compensatory payment and that the Compact pooling scheme thus qualifies as such. In support of their argument, plaintiffs rely on the first and third sentences of § 7256(7):

> The Northeast Interstate Dairy Compact Commission shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area in the United States.... The Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose.

Id. The Commission points to the fourth and final sentence of the subsection: "Establishment of a Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition of the marketing of milk." *Id.*; *see also In re Crowley Foods, Inc.*, Nos. HEP-97-001, -002, -004 & -005, at 15 ("The third and fourth sentences of the condition clearly must be read together. The

express statement of the fourth sentence--that price regulation, in itself, shall not be considered a compensatory payment--strongly establishes that use of the remainder of the Compact's unconditioned regulatory provisions should not be construed as involving the use of 'compensatory payments.' "). The Commission described a "compensatory payment pattern of regulation," as authorized by section 10(6) of the Compact, as follows:

> Such a pattern requires persons bringing milk into the regulated area to make a payment into the pool designed to "equalize" the cost for such milk against the cost paid by pool plants. As simply making an equalization payment, furthermore, such a person receives no credit from the pool for disbursement to supplying farmers. For example, such an equalization payment would have required petitioners on August 18 to make payment in some amount resembling $1.72 ($3.00-$1.28 (debit-credit paid by and to pool plants)). According to this regulatory pattern, furthermore, petitioners would have received no over-order credit for disbursement to producers.

Id. at 17.[10] The Commission argues that the fundamental difference between compensatory payments--provided for in section 10(6) and outlawed by Congress--and pooling--permitted by section 10(7) and not outlawed by Congress--turns on whether the proceeds of the monetary obligation are shared with farmers who supply the out-of-region plant (pooling) or whether the proceeds benefit only producers who supply the other, in-region plants (compensatory payments). (Defs.' Reply Mem. Supp. Mot. Summ. J. at 13.)

Although it recognized that the distinction between the full pooling pattern of regulation authorized by Compact section 10(7) and the compensatory payment pattern authorized under section 10(6) "may be a subtle one," the Commission correctly pointed out that "it is no

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[10] This description is consistent with the use of the term "compensatory payment" in the case law cited by the plaintiffs. *See, e.g., Lehigh Valley Co-op. Farmers, Inc. v. United States*, 370 U.S. 76, 82, 82 S.Ct. 1168, 8 L.Ed.2d 345 (1962) (discussing a plan requiring handlers who bring "outside" milk into the regulated area to make a compensatory payment to the pool producers); *Farmland Dairies v. McGuire*, 789 F.Supp. 1243, 1247-48 (S.D.N.Y.1992) (describing an equalization fund established under New York law requiring compensatory payments on non-New York Class I milk that benefited only New York farmers). The Commission states that it derives its authority to regulate the plaintiffs from section 10(7) of the Compact and not from section 10(5)(A), which applies to equalization pools.

less vital for that subtlety" because Congress recognized the distinction in the Compact. *In re Crowley* at 17. The Commission persuasively reasoned that the "express inclusion of the one pricing mechanism of compensatory payments under § 10(6), along with another, distinct, mechanism of 'pricing and pooling of milk' immediately following under § 10(7), establishes that the Compact as originally conceived contained two separate means to regulate milk brought into the regulated area" from outside the area. *Id.* at 16.

Because Congress' conditional consent made explicit the nullification of the Commission's authority to promulgate compensatory payments under section 10(6) of the Compact but left intact the Commission's authority to promulgate provisions governing the pricing and pooling of partially regulated plants pursuant to section 10(7), I conclude that the Commission has demonstrated that the pooling scheme promulgated by the Commission pursuant to section 10(7) is not precluded by the Compact, Condition 7 of Congress' consent to the Compact, or the Commerce Clause.

E. Administrative Assessments for Regular Costs

Plaintiffs also contend that, even if they are subject to the Commission's regulatory authority, aspects of the Commission's regulations conflict with provisions of the

Compact. In particular, plaintiffs challenge the Commission's imposition of an additional administrative assessment on handlers distributing Class I milk in New England regardless of the source of the milk they process, 7 C.F.R. § 1308.1 (1997).[11] They point

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[11] At oral argument, plaintiffs also bitterly complained that the pooling scheme unfairly affords pool plants an allocation preference and, in doing so, violates sections 10(5)(A) and/or 10(7) of the Compact. Reiterating the gist of their alleged injury, plaintiffs pointed out that, although both pool plants and partially regulated plants incur the same payment obligations into the pool (*i.e.*, in proportion to their respective fluid milk distributions in the region), pool plants receive payments back for disbursements to producers based on the total volume of their milk receipts regardless of use, whereas partially regulated plants receive payments back only on their fluid milk distribution in New England. Plaintiffs claim that this scheme creates an unfair incentive for New York producers to supply milk to pool plants in order to maximize their returns from the pool. However, plaintiffs have not pressed an equal protection challenge to the scheme, although they make passing reference to such a claim in the Amended and Supplemental Complaint, (PP 76-77). The primary argument appears to be that this method of pooling is inconsistent with the approach that federal regulators have taken and hence is inconsistent with the provisions in the Compact authorizing equalization pools, Compact, § 10(5)(A). However, the Commission states that it is relying on section 10(7) and not on section 10(5), *see, e.g., In re Crowley* at 21 n. 28, and that its regulatory approach is logical because it has authority to regulate only Class I milk distribution into New England. It treated the issue only cursorily in its final decisions on plaintiffs' petitions. *See In re Elmhurst Dairy, Inc.*, Nos. HEP-97-007 & -008, at 9-11; *In re*

to language in section 18(a) of the Compact, which provides: "In order to finance the costs of administration and enforcement of this compact, including payback of start-up costs, the commission is hereby empowered to collect an assessment from each handler who purchases milk from producers within the region." Compact, § 18(a). This initial assessment, if imposed, can be collected on a monthly basis for up to one year from the date the Commission convenes. *See id.* The Commission concedes that it has no authority to impose assessments for start-up costs on handlers who purchase milk from producers outside the region. However, it concluded that it is vested with the authority to impose administrative assessments on such handlers as part of an over-order regulation. Section 18(a) of the Compact states that, "[i]n addition, if regulations establishing an over-order price ... are adopted, they may include an assessment for the specific purpose of their administration." *Id.* Because the Commission's regulatory authority extends to all regulated handlers--including partially regulated plants--plaintiffs' argument is without merit.

Plaintiffs claim that the assessment violates the equal protection clauses of the state

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Crowley at 16 n. 21, 20-21 & n. 28. This issue of why the allocation preference is inconsistent with section 10(5) and/or section 10(7) was raised in passim at oral argument and was inadequately briefed or explained in the record before me.

and federal constitutions because it should also apply to Class II and III distributions (e.g., yogurt, cheese, butter). This is sour milk. As the Commission has no regulatory authority over non- Class I distributions, it is rational for the Commission to assess the costs of administering the over-order regulation--an assessment to which Congress consented--on all those who distribute Class I milk in the regulated area "as a cost of doing business in the market." *In re Crowley* at 25. Plaintiffs have not demonstrated that statutory discrimination among different classes of milk in calculating the assessments is not rationally related to the legitimate interest of administering the Compact. *See generally Friedman v. Rogers*, 440 U.S. 1, 17, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979) (*quoting New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976), for the "rationally related to a legitimate state interest" standard); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 660 (1st Cir.1997) (describing rational basis review), cert. denied, ---- U.S. ----, 118 S.Ct. 2366, 141 L.Ed.2d 735 (1998).

F. Due Process

Plaintiffs claim that New England producer and processor participation in the promulgation of an over-order price and in the "adjudicatory review" of that regulation violates the Due Process Clauses of the Fifth and Fourteenth Amendments because such

individuals have a direct and substantial pecuniary interest in the milk pricing.[12]

Individuals from a particular industry typically serve on administrative bodies with regulatory authority over that industry. *See, e.g., Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 2134, 2142, 138 L.Ed.2d 585 (1997) (upholding a statutory scheme in which advisory committees for the regulation of nectarines and peaches consisted of affected farmers); *Friedman*, 440 U.S. at 18, 99 S.Ct. 887 (upholding a state statute requiring that a majority of optometry board members be drawn from an organization of professional optometrists); *Stivers v. Pierce*, 71 F.3d 732, 743 (9th Cir.1995) ("[T]he system of industry representation on governing or licensing bodies is an accepted practice throughout the nation."); *Abramson v. Gonzalez*, 949 F.2d 1567, 1579 (11th Cir.1992).

With regard to the Commission's adjudicatory capacity, it is well-settled that a

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[12] The Commission argues that the challenge to its final decision-making process on the administrative petitions is procedurally defaulted because plaintiffs failed to present this claim to the Commission or to seek recusal of any Commission members. Although exhaustion is generally required, I conclude that this issue was fairly presented to the Commission. Although plaintiffs did not separately challenge the final decision-making process on the administrative petitions, they did challenge the rulemaking proceedings. In these circumstances, the challenges conflate.

fair proceeding before an impartial decision maker is a basic requirement of due process, applicable to administrative agencies as well as the courts. *See Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). "Among the cases in which the appearance of bias is 'too high to be constitutionally tolerable' are those in which the adjudicator has a direct and substantial pecuniary interest in the outcome of the case before him." *Stivers*, 71 F.3d at 742 (*quoting Withrow*, 421 U.S. at 47, 95 S.Ct. 1456). When an adjudicator has a direct, personal and substantial pecuniary interest, her participation constitutes a per se violation of due process. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). However, due process is not violated by the participation of adjudicators who "might conceivably have had a slight pecuniary interest" in the outcome of the case before them. *Id.* at 825, 106 S.Ct. 1580; *see also Tumey v. Ohio*, 273 U.S. 510, 518-19, 523, 535, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (finding a due process violation when, under a village ordinance establishing a "Mayor's Court" under the state's prohibition statute, the mayor was not compensated for hearing cases for violations of the statute unless they resulted in convictions).

Although there is a constitutional right to a fair and impartial hearing in an adjudicatory matter (i.e., a disciplinary hearing), there is no commensurate due process right to be regulated

by an agency composed of members sympathetic to a particular economic interest. *See Friedman*, 440 U.S. at 18, 99 S.Ct. 887. "The Due Process Clause imposes only broad limits ... on the exercise by a State of its authority to regulate its economic life," *id.* at 18 n. 19, 99 S.Ct. 887, and the " 'rigid requirements' ... designed for officials performing judicial or quasi-judicial functions" are not applicable when the determinations affecting liability are not adjudicative, *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 618, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) (*quoting Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980)).

The agency proceedings here involve a challenge to the Commission's regulations on the grounds that they are contrary to the Compact and to the congressional consent legislation. The Commission represents diverse interests, not solely those of New England producers and processors. Pursuant to the terms of the Compact, the state delegations for each of the six participating states must include at least one "consumer representative" and one "dairy farmer." Compact, § 4. The inclusion of dairy farmers on the Commission reflects a deliberate judgment by the participating Compact states-- a judgment approved by Congress--to account for dairy farmer expertise within each state delegation.

In light of the flexibility of the Due Process Clause, plaintiffs have not shown that the constituency of the state delegations that vote on over- order price regulations and on the legal petitions objecting to them unduly stretches the elastic reach of the Clause. *See Schweiker v. McClure*, 456 U.S. 188, 200, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982) (rejecting the plaintiff's due process challenges "in light of the strong presumption in favor of the validity of congressional action and consistently with this Court's recognition of 'congressional solicitude for fair procedure'" (*quoting Califano v. Yamasaki*, 442 U.S. 682, 693, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979))).

G. Elmhurst

Finally, plaintiff Elmhurst Dairy contends that the Commission has no regulatory authority to impose prices or regulatory assessments on it because it has no Class I distribution of milk in the regulated area. Instead, it sells packaged milk to an unaffiliated New York distributor that has some customers in New England. The Commission rejected this challenge, reasoning that "[t]he fact that the milk is sold in New England by a third party does not change the economic advantage that petitioner and the third party would gain if the regulation were not applied to those sales." *In re Elmhurst* at 9. In light of the skeletal briefing on this point, this issue appears particularly appropriate for *Chevron* deference because

Congress has not directly addressed the question and the Commission's construction of the Compact and its purpose seems reasonable. *See Old Town Trolley Tours of Washington, Inc. v. Washington Metro. Area Transit Comm'n*, 129 F.3d 201, 204 (D.C.Cir.1997) (affording judicial deference to decisions of interstate agencies).

ORDER

Defendants' motion for summary judgment (Docket No. 43) is ALLOWED. Plaintiffs' motion for summary judgment (Docket No. 55) is DENIED. Defendants' motion to dismiss (Docket No. 34) is DENIED.

APPENDIX C

NORTHEAST DAIRY COMPACT COMMISSION

In Re Petitions of Crowley Foods, Inc., Stewart's Processing Corp., Farmland Dairies, Inc., and Cumberland Farms, Inc.	)	Docket Numbers: HEP-97-001, 002, 004 and 005

Final Decision of the Commission

I. FINDINGS OF FACT

The Northeast Dairy Compact Commission, having received and considered the Original Proposed Findings of Fact, Conclusions of Law, and Decision of the hearing panel, Petitioners' Response of September 19, 1997, the panel's Final Proposed Findings of Fact, Conclusions of Law and Decision, and the record developed in the proceedings, finds the following facts:

1. Crowley Foods, Inc. is a New York corporation with its principal corporate offices at 49 Court St., Binghamton, NY 13902. Crowley Foods owns and operates packaged fluid milk processing and manufacturing plants in Albany and Binghamton, New York. These plants distribute fluid milk products in New England, including Massachusetts. These

plants receive raw milk from dairy farms located almost exclusively outside of New England.

2. Stewart's Processing Corp. is a New York corporation with principal corporate offices and a fluid processing plant located at Saratoga Springs, New York 12866. Stewart's Processing receives its raw milk supplies from New York dairy farms and distributes its packaged fluid milk products to stores in New York and Vermont.

3. Farmland Dairies, Inc. is a New Jersey corporation with principal corporate offices and a milk processing plant at 520 Main Ave., Wallington, New Jersey 07050. Farmland procures its raw milk supply from farms located in New Jersey, Pennsylvania, and New York. Farmland distributes packaged fluid milk products to customers in New Jersey, New York, Pennsylvania, and New England.

4. Cumberland Farms, Inc. is a Delaware corporation with principal corporate offices at 777 Dedham St., Canton, Massachusetts 02062. Cumberland Farms owns and operates a fluid milk processing plant in Rensselaer (East Greenbush), New York, which receives raw milk from dairy farmers located primarily in eastern and central New York, and a small supply

from producers in Vermont. Cumberland Farms competes with New England processors and handlers for raw milk supplies throughout its New York procurement area. Cumberland Farms distributes packaged fluid milk products from that plant to its own convenience stores and to other buyers in New York, Pennsylvania, Connecticut, Massachusetts, New Hampshire and Vermont.

5. Petitioners, in aggregate, supply approximately three percent of all packaged, Class I, fluid milk sales in the regulated area of the six New England states. Almost all of the remainder of the supply is provided by plants located in the New England region.

6. During the summer and fall of 1996, the Compact Commission was organized pursuant to specific requirements of Article III of the Northeast Interstate Dairy Compact. § 4 of the Compact requires that:

> "There is hereby created a commission to administer the compact, composed of delegations from each state in the region. A delegation shall include not less than three nor more than five

persons. Each delegation shall include at least one dairy farmer who is engaged in the production of milk at the time of appointment or reappointment and one consumer representative. Delegation members shall be residents and voters of, and subject to such confirmation process as is provided for in, the appointing state. Delegation members shall serve no more than three consecutive terms with no single term of more than four years, and be subject to removal for cause."

7. There is at least one dairy farmer and one consumer representative, so designated by the appointing authority of each of the six New England states as required by the Compact, duly appointed and serving. The Commission includes the following members with their representative affiliation indicated:

Connecticut:
William R. Brophy III Retailer
Shirley Ferris Commissioner, Dept. of Agriculture
Robert Jacquier Dairy Farmer

Mae S. Schmidle Consumer Representative
Frank A. Starvel Dairy Processor

Maine:
Fred Hardy Dairy Farmer
Ed McLaughlin Commissioner, Dept. of Agriculture
Michael A. Wiers Consumer Representative

Massachusetts:
Charles Arbing Dairy Processor
Gordon Cook Dairy Farmer
Jay Healey Secretary, Dept. of Food and Agriculture
Mary Kelligrew Kassler Consumer Rep. (Director, MA WIC Program)
Samuel Shields Dairy Farmer

New Hampshire:
Powell Cabot Dairy Processor
Debora Erb Dairy Farmer
William Zweigbaum Consumer Representative

Rhode Island:
(vacant as of 7/1/97) Consumer Representative
Aaron W. Briggs Dairy Farmer
Steve Volpe Acting Administrator, Div. of Ag. Programs
John L. Smith Director, RI WIC Program

Christine Jabour Asst. Atty. Gen.(Chief, Consumer Protection.)

Vermont:
Jaques Couture Dairy Farmer
Andy Dykstra Dairy Farmer
Harold Howrigan Dairy Farmer
Millicent Rooney Dairy Processor
Robert Starr Consumer Representative

8. § 4 of the Compact further provides that in all respects other than those referred to in Finding #6, "delegation members shall serve in accordance with the laws of the state represented." Each member of the Commission currently serving was duly appointed in accordance with the laws of each of the states.

9. During the period from December 1996 to April 1997, the Compact Commission conducted meetings and public hearings on price regulation, and received written comments and proposals. The Commission takes official notice that 52 witnesses appeared during the hearings, advocating a variety of approaches to an over-order price structure including specific prices and limits on outside milk from coming into the regulated area. The Commission also received 79 written comments and exhibits on the proposed rule during the informal rulemaking process. In its

published Final Rule, the Commission noted that it:

> "was persuaded by the reasoning of economists Reenie DeGeus and Bill Gillmeister, dairy economists for the Vermont and Massachusetts Departments of Agriculture, respectively. They jointly proposed, and the Commission adopted, an over-order price regulation based in part on an inflation adjustment. Using the Class I, Zone 1 price for 1991 as the base year (a year in which prices were markedly low), and adjusting forward using the 1990 Consumer Price Index (CPI), yielded the amount of $16.94." See: 62 FR 29634 (May 30, 1997).

10. Based on Finding #9, officially noticed from the public rulemaking record, petitioners' alleged Statements of Fact 11 and 13 are deemed irrelevant and immaterial as evidence of how the Commission decided on the over-order price of $16.94. Further, the Commission finds that petitioners' allegations regarding AgriMark and its economist are not credible to prove petitioners' inference

of bias in the Commission or irregularity in its rulemaking process.

11. The Commission published a narrative Decision and Final Rule, *See*: 62 FR 29626 *(May 30, 1997).* The Commission conducted a producer referendum which approved the Final Rule, codified at 7 CFR §§ 1300.1 *et. seq.*

12. The Final Rule established a Class I, Zone 1, over-order price of $16.94/cwt. The over-order price regulation applies to the route distributions of Class I milk in New England by pool plants and partially regulated pool plants, and other handlers. 7 CFR § 1301.9.

13. The Compact over-order price obligation for milk marketed in July 1997, to be paid by pool plants and partially regulated plants, was $3.00/cwt., representing the difference between the July Class I milk price under Federal Milk Marketing Order #1 at Boston (Zone 1) ($13.94), and the Compact over-order price ($16.94). The August, 1997 over-order price obligation was $2.96. The September, 1997 over-order price obligation is $2.84. The October, 1997 over-order price obligation will be $ 1.63.

14. 7 CFR § 1301.1 requires all handlers to file reports of monthly milk receipts and

Class I distributions in the regulated area on or before the 8th of each month. 7 CFR § 1307.2 requires the Commission to render a statement of the Compact over-order obligation to handlers on or before the 15th day of each month. 7 CFR § 1307.3 requires payment by handlers of the Compact over-order obligation on or before the 18th day of each month. It also requires payment by the Commission to the handlers of their producer-settlement fund credit by the 20th day of each month. Handlers are then required by 7 CFR § 1307.4 to pay their producers the over-order producer price/cwt. of production on or before the 20th day of each month.

15. As found in Findings # 1 through 4 above, each petitioner has a plant which is located outside the regulated area of the six New England states and has Class I distributions within the regulated area. All four petitioners thereby come under the definition of "handler" under 7 CFR § 1301.9, each being a "partially regulated plant" within the meaning of § 1301.6.

16. The Compact over-order price regulation requires distribution to producers of a "compact over-order producer price" per cwt. of production. *See:* 7 CFR §§ 1306.3 and 1307.4. Distribution is made to all New England farmers supplying pool plants and

partially regulated plants and to out-of-region farmers supplying such plants.

17. Out-of-region producers who ship to pool plants qualify for distribution,

> "provided that on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during December 1996, all of that milk was physically moved to a pool plant in the regulated [area] OR: to be considered a qualified producer, on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during the current month and for five (5) months subsequent to July of the preceding calendar year, all of that milk must have moved to a pool plant;" 7 CFR § 1301.11(b).

18. Any out-of-region producer who ships to a partially regulated plant under the rule qualifies for disbursement. 7 CFR § 1301.11(c).

19. For August, 1997, the over-order producer price was $1.30/cwt. The actual

amount distributed was $1.28/cwt., reflecting the payment amounts into the court registry escrow account by petitioners.

20. Assuming the traditional utilization rate of approximately 50%, the over-order producer price in September will be $1.40/cwt., which would be adjusted for the payments into escrow to $1.38.cwt. The projected October distribution would be $.74/cwt., which would be adjusted for payments into escrow to $.72/cwt.

21. The New England traditional milk market has historically been supplied by, among others, milk processing plants located outside the physical boundaries of the six New England states, such as those owned by petitioners. *See:* 62 FR 29635 and 23039-23040.

22. Most of the dairy farms in the New England milkshed are organized into dairy cooperatives.

23. In general, milk processing plants do not, as a matter of practice, segregate producer milk received from differing locations for processing purposes. Rather milk is generally co-mingled as a joint supply of raw product for processing purposes.

24. Under the Compact over-order price regulation, all pool plants and partially regulated plants are subject to an identical over-order price obligation and receive over-order credit from the pool. For example, all pool plants and partially regulated plants were subject on August 18 to the identical $3.00 over-order obligation for their route distributions in the New England regulated area for July milk. Pool plants and partially regulated plants also received the same disbursement of the $1.28 over-order producer price on August 20. Similarly, all pool plants and partially regulated plants will be subject on October 18 to the (estimated) identical $1.63 over-order obligation for their route distributions in the New England regulated area for September milk. Pool plants and partially regulated plants will also receive the same disbursement of the (estimated) $0.72 over-order producer price on October 20.

25. All producers supplying partially regulated plants receive a pro rata share of the disbursement made to such plant for its Class I distributions in the New England regulated area. For example, on August 20, partially regulated plants received the over-order producer price of $1.28 on the volume of all Class I distributions in the New England

marketing area, for disbursement pro rata to all producers supplying such plants.

26. Pursuant to § 18(a) of the Compact, on November 5, 1996, the Commission established a start-up assessment for one year, imposed upon "each handler who purchases milk from producers within the region," for Class I distributions in the New England marketing area by such handlers. The start-up assessment was in the amount of 1/10th of 1% the Federal Milk Market Order #1, Zone 1, Blend Price. The start-up assessment was not imposed on any of the petitioners.

27. Also pursuant to § 18(a) of the Compact, the Commission imposed an administrative assessment as part of the Compact over-order price regulation. *See:* 7 C.F.R. Part 1308. Pursuant to § 18(a) of the Compact, the administrative assessment was imposed "for the specific purpose of [the regulation's] administration, in the amount of 3.2 cents/cwt., upon all Class I route distributions in the New England marketing area.

28. Congress expressly approved the text of the Compact in §147 of the 1996 Farm Bill, 7 U.S.C. § 7256, referenced as S.J. Res. 28(1)(b). In discussing that section as part of the Conference Report on the 1996

Farm Bill, Senator Leahy and Senator Lugar noted that:

> "This compact will allow the six New England States to regulate the price of all class drinking milk sold in those States. The regulation may apply to any class milk sold in the New England States but produced elsewhere, as well as to such milk produced by New England farmers. The compact also provides that farmers from beyond New England receive its benefits as well as their New England counterparts." 142 Cong. Rec. S3056 (Mar, 28, 1996).

Senator Leahy and Senator Lugar also noted that Congressional Consent to the Compact did not:

> "limit the compact commission's authority to establish a compact over-order price regulation for all fluid milk marketed into the compact region in any form, packaged or bulk, produced in another production region

in the United States." Id. at 3057.

29. The Federal District Court found in its Order of August 13, 1997 that the

> "Compact price regulation provides no incentive or basis for the New England-based plant to switch or add supply from a farmer associated with on of the plaintiffs [including the petitioner]. Based on the fundamental principle of marketing area-based pricing, the New England-based plant must always pay the same price for milk. Thus, there is no incentive for the New England-based plant to switch supply to that provided by a farmer associated with one of the plaintiffs [including the petitioner]. Indeed, to do so would likely mean disrupting well-established patterns of supply with individual farmers and cooperatives. Also, Ross points out that because there are ample supplies of milk, there should be no disruption." Order, August 13, 1997, New York

State Dairy Foods, Inc., et. al. v. Northeast Dairy Compact Commission, et. al., Civil Action No. 97-11576-PBS at 3 (citing affidavit of Carmen L. Ross).

30. Insofar as petitioners' alleged Statements of Fact 1, 2, 3, 4, 5, 6, 7, 8, 9, 17, and 18 characterize the law and its application, rather than facts, they are dealt with in the Commission's Conclusions of Law.

31. Insofar as Statements of Fact 22 through 27 and the allegations of facts in the appended affidavits describe alleged economic harm to petitioners, they are dealt with in the Commission's Conclusions of Law.

II. CONCLUSIONS OF LAW

At the outset, the Commission notes that it finds the presentation of petitioners' legal claims and the alleged facts upon which those claims are based to be confusing, repetitive, overgeneralized, conclusory and speculative. The petitioners' use of word processing technology has served neither the petitioners, the panel, nor the Commission well. Notwithstanding the petitioners' failure broadly to meet their burdens of production and persuasion, the Commission will go forward

with its decision in the interest of administrative justice. To the degree necessary and possible, the Commission has interpreted and clarified the petitioners' claims based on their submissions.

The petitioners' response filed on September 19, 1997, offers little clarification or assistance in this regard. Although it generally outlines "objections" to the panel's Proposed Findings, it suggests no specific modifications, alterations, or amendments. The continuing lack of specificity has been particularly difficult for the panel and the Commission to deal with in light of the stipulated time frame for an expedited decision.

On this basis, the Commission considered each of petitioners' stated "Grounds on Which the Regulation and its Application are Challenged As Not Being In Accordance With Law." The Commission's Conclusions of Law with regard to each of petitioners Grounds are set forth below, in the same order as presented by petitioners. The format of petitioners' presentation of legal claims is followed with the exception of Sections 1E and 4B where the Commission has separately responded to petitioners' claims of economic harm gleaned from petitioners' submissions.

1. Authority to Regulate Class I Milk Produced, Packaged and Processed Outside of New England

Based on a number of grounds, petitioners challenge the Compact Commission authority to regulate "Class I milk produced by dairy farmers outside of New England, packaged and processed outside of New England, but sold in packaged form to New England customers."

A. Constitutional Claim

First, and most broadly asserted, petitioners claim that the exercise of such regulatory authority over milk produced and packaged outside of New England violates the Commerce Clause, Article I, § 8 of the United States Constitution, in that the authority was not consented to by Congress. As the Commission found at Finding #28, Congress expressly approved the text of the Compact relied upon by the Commission in imposing and administering its price regulation. The introductory paragraph of the Consent declares that:

> "Congress hereby consents to the Northeast Interstate Dairy Compact entered into among the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont as specified in section 1(b) Senate Joint Resolution 28 of the 104th Congress, as placed on the

> calendar of the Senate. . . [Emphasis supplied].

As discussed below, petitioners' claims contradict the statutory language. *See, e. g. §§ 9(d) and 10(7); subparts B and C infra.* In addition, petitioners' claims misapprehend the basic constitutional function of the Compact.

The Compact's Statement of Purpose and Declaration of Policy expressly contemplates formal, cooperative, interstate regulation of the entire relevant, *regional,* milk market by the participating states, to cure the problem inherent in the historic pattern of limited, individual, state market regulation. That historic pattern of limited, individual state regulation is outlined in the Statement of Purpose at § 1 of the Compact:

> "Historically, individual state regulatory action has been an effective emergency remedy available to farmers confronting a distressed market. The federal order system, implemented by the Agricultural Marketing Agreement Act of 1937, establishes only minimum prices for dairy products, without preempting the power of states to regulate milk prices above the minimum levels so established. Based on this authority, each state in the region has individually attempted to implement

> at least one regulatory program in response to the current dairy industry crisis.

The Commission interprets petitioners' unclear characterization of the Compact's regulatory pattern as strikingly similar to that utilized historically by individual states and as described by this cited paragraph from the Compact's Statement of Purpose. Under petitioners' model, the New England region is made to resemble an individual state, such that the regulatory authority stops at the line demarcated by the territorial boundaries of the six states, much as the authority of an individual state may reach only to its state borders, by operation of the Commerce Clause. *See: Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935) and *West Lynn Creamery v. Healy*, 512 U.S . 186 (1994).

Yet immediately after the above-cited paragraph, the Statement of Purpose contrasts the Compact's interstate, regional regulatory pattern with this historic, single-state pattern:

> In today's <u>regional dairy marketplace</u>, cooperative, rather than individual state action may address more effectively the market disarray. Under our constitutional system, properly authorized, states acting cooperatively may exercise more power to regulate interstate

> commerce than they may assert individually without such authority..." [Emphasis added].

The New England marketplace is configured regionally in precisely the manner contemplated by the Statement of Purpose. The Commission found in Finding #5 that the market is primarily supplied by processing plants located in the Compact region, or within the territorial boundaries of the six New England states. In marginal but still significant amount, the market is also supplied by plants, including those operated by petitioners, located outside the territorial boundaries of the New England states.

In sum, New England's traditional milkshed and milk market are not demarcated by state borders – they are regional. The function of regulation for a market with such regional character, within the meaning of the Compact's Statement of Purpose, can only be made effective by application to the market's supply in total. To configure the Compact price regulation so as to allow one traditional component of the market's supply to participate unregulated in the marketplace, in the manner asserted by petitioners, would be simply to render the regulatory scheme inoperative and therefore absurd within the meaning of this Statement of Purpose.

Petitioners' affiant, Robert Handforth has indicated that without the imposition of the regulation on its New York milk supply, it would be able to significantly increase its sales in New England. Were packaged milk from this source of supply allowed to enter the market unregulated, such milk would be able to undercut the regulated price imposed upon the regulated competition. While the supply provided by plants located outside the New England region is relatively marginal, it is apparent that this market share could quickly increase if left unregulated against its competition. The net result would thereby be to provide the unregulated milk a competitive advantage in the marketplace *solely on the basis of operation of the regulation.* This would be irrational market regulation.

To reinforce the Commission's reading of the language of the Congressional Consent, the Commission takes note that the Compact's legislative history contains two express descriptions of the Compact's authority to regulate milk produced and packaged outside the New England market for distribution in the market. As set forth in Finding #28, the Congressional Record includes a colloquy of key Senators on this precise point. Senator Leahy, Compact sponsor and Farm Bill conferee, first explained, generally, that:

> This compact will allow the six New England States to regulate the price

> of all class drinking milk sold in those States. The regulation may apply to any class I milk sold in the New England States but produced elsewhere, as well as to such milk produced by New England farmers.. 142 Cong. Rec. S3056 (Mar. 28, 1996) (Emphasis added).

Senator Leahy and Senator Lugar also emphasized that the Congressional conditions of consent do not "limit the compact commission's authority to establish a compact over-over price regulation for all fluid milk marketed into the compact region in *any form, packaged or bulk, produced in another production region in the United States.*" 142 Cong. Rec. S3057 (Mar. 28, 1996) [Emphasis added].

A plain reading of the Compact's provisions as reinforced by the relevant legislative history answers any question of constitutional infirmity raised by petitioners. Absent express conditions of Congressional consent, as a creature of federal law, the Compact's authority to regulate milk produced and packaged outside the New England states and marketed in those states is immune from challenge under the Interstate Commerce Clause, in the manner asserted by petitioners. *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985).

B. Intended Geographic Limits of Congressional Consent and the Secretary of Agriculture's Finding of Compelling Interest

Petitioners appear to claim that the Commission's authority is limited by Congressional Consent to the territorial region of New England. Based on the plain language of the Congressional Consent as reinforced by the legislative history quoted above from Senators Leahy and Lugar at 142 Cong. Rec. S3056 and S3057 (Mar. 28, 1996) that "[t]he regulation may apply to any class I milk sold in the New England States but produced elsewhere, as well as to such milk produced by New England farmers," the Commission concludes otherwise. There the Senators emphasized that the Congressional conditions of consent do not "limit the compact commission's authority to establish a compact over-order price regulation for all fluid milk marketed into the compact region in any form, packaged or bulk, produced in another production region in the United States."

The Commission has found in Finding #21 that the traditional New England milk market or milkshed has historically been supplied by milk processing plants located outside the physical boundaries of the six New England states. The Congress, in approving the text of the Compact, authorized the Commission to regulate Class I milk sold in New England regardless of where it

was produced. *See:* 142 Cong. Rec. S3056. To conclude that Congress intended otherwise would make the regulatory scheme unworkable and would thwart the purposes of the Compact, the actual text of which the Congress approved. *See:* supra at p. 13.

The petitioners also assert that the extension of the Compact over-order price regulation to Class I milk produced and processed outside of New England violates the regional limitations in the Secretary of Agriculture's determinations of public interest. The Commission rejects this claim for the reasons outlined above. The Commission notes that the Secretary's authority to make the finding has been exercised and upheld by the Federal District Court in the case of *Milk Industry Foundation v. Glickman,* 949 F. Supp. 882 (D.D.C. 1996) and *Milk Industry Foundation v. Glickman,* 967 F. Supp. 564 (D.D.C. 1997).

The Commission concludes that there is no limitation in either the Congressional Consent or Secretary Glickman's authority or finding of compelling public interest.

C. Construction of the First Sentence of 7 U.S.C. § 7256(7), hereinafter referred to as Condition of Consent #7

Petitioners further assert that Condition of Consent #7 in fact limits such regulatory authority. Petitioners assert that such

authority, "violates the express mandate of § 147(7) of the Farm Bill that the Commission shall take no action which will 'in any way limit the marketing in [New England]... of any milk or milk product produced...' outside of New England." Petitioners' reading of § 147(7) is improperly restrictive, as well as inconsistent with the overall statutory design of the Compact as expressly approved by Congress.

The first sentence cited by petitioners must be read in context with the entire subsection. 7 U.S.C. §7256(7), in its entirety, reads as follows:

> "(7) The Northeast Interstate Dairy Compact Commissions shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in other production area in the United States. The Compact Commission shall respect and abide by the ongoing procedures between Federal milk marketing orders with respect to the sharing of proceeds from sales within the Compact region of bulk milk, packaged milk, or producer milk originating from outside of the Compact region. The Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the

> Compact region or for any other purpose. Establishment of a Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition of the marketing of milk. " (Emphasis added)

The fourth, or last, sentence of Condition of Consent #7 makes clear that the imposition of price regulation upon packaged milk brought in from outside the Compact region, "in itself," does not constitute a limitation or prohibition of the marketing of such milk. This sentence directly contradicts petitioners' reading of the condition of consent.

Rather than mandating a blanket prohibition of regulation as argued by petitioners, the Commission reads Condition of Consent #7, including the first sentence, as instead reinforcing a basic principle of milk market regulation. This principle establishes that any regulated market must remain open to competition from outside the market in all respects except for operation of the regulation. More particularly, price regulation uniformly applied to all market participants ensures the regulation creates neither competitive advantage nor disadvantage. In this manner, the regulation, "by itself", creates neither limitation nor prohibition on the marketing of milk in the regulated area.

Petitioners' selective and restrictive reading of Condition of Consent #7 is also inconsistent with the essential regulatory provisions contained in the Compact and approved without condition by Congress. These provisions provide express authority to regulate milk brought in from beyond the New England regulated area.

Section 10(7) of the Compact authorizes the Compact to regulate milk handled by "partially regulated plants". Section 2(7) defines a partially regulated plant as a "milk plant not located in a regulated area but having sales within such regulated area, *or* receipts in such area." (Emphasis added). Congress in no way conditioned or eliminated this express authority to regulate "sales within such regulated area" by a "milk plant not located in a regulated area." Petitioners' contention that the Commission lacks the authority to regulate such milk is thus misplaced.

Finally, petitioners' apparent concept of a "partially regulated plant" highlights the irrational market consequences that could flow from petitioners' proposed construction of the first sentence of Condition of Consent #7. Petitioners' concept of a partially regulated plant would apparently allow regulation of milk produced by New England farmers and packaged by a plant located outside the region for sale within the region. At the same time,

milk produced by farmers outside the region for such processing and sale would evade regulation. Accordingly, a partially regulated plant could simultaneously market regulated and unregulated milk from the same plant.

Under the regulatory pattern set forth by petitioners, it can be envisioned that such regulated and unregulated packaged product processed at the same plant could wind up being sold side by side in a retail outlet. This would certainly be the case for petitioners Cumberland Farms and Stewart's Dairy, which retail the milk processed by their milk plants in New England retail outlets.

The Commission finds such a regulatory pattern can only be termed irrational, and contrary to the stated purpose of authorizing regulation of the regional marketplace. It is also contrary to the express provision of § 3(b) of the Compact which reads:

> "It is the intent of this compact to establish a basic structure by which the commission may achieve those purposes [enunciated in § 1] through the application, adaptation and development of the regulatory techniques historically associated with milk marketing and to afford the commission broad flexibility to devise regulatory mechanisms to

> achieve the purposes of this compact."

Finally, the Commission notes that certain express, technical, terms of the Compact further establish the provision of regulatory authority over milk produced and processed outside the regulated area. § 9(d) provides that whenever price regulation has been established,

> The legal obligation to pay such price shall be determined solely by the terms and purpose of the *regulation without regard to the situs of the transfer of title*, possession or any other factors not related to the purposes of the regulation and this compact. (Emphasis added.)

§ 9(d)'s application of the regulation "without regard to the situs of the transfer of title" is provided without limitation. The "legal obligation" to adhere to the regulation thus extends beyond any territorial boundaries as advocated by petitioners.

D. Compensatory Payments

Petitioners further argue that price regulation of milk produced, processed and packaged outside of New England and marketed in New England "violates the express prohibition in §147(7) of the Farm Bill against use of 'compensatory payments under §10(6) of the Compact...for

any...purpose"'. Petitioners' construction of this third sentence of Condition of Consent #7 is to preclude completely the Commission's authority to regulate any milk brought in from outside the territorial boundaries of New England. The thrust of petitioners' apparent argument is that any regulation of such milk constitutes imposition of a compensatory payment prohibited by condition (7).

In part for the reasons set forth in subsections A and C, above, the Commission rejects this construction of Condition of Consent #7 as establishing such a blanket prohibition of the regulation of milk brought in from outside the New England states. Petitioners' construction is also, again, too restrictive with regard to the condition's overall treatment of compensatory payments. Furthermore, petitioners' construction is inconsistent with the Compact's inclusion of another provision, left unconditioned by Congress, which provides an explicit methodology for pricing of such outside milk and which is distinct from the compensatory payment approach.

Again, petitioners' selective citation to condition of consent (7) must be read in context:

> "(7) The Northeast Interstate Dairy Compact Commissions shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced

> in other production area in the United States. The Compact Commission shall respect and abide by the ongoing procedures between Federal milk marketing orders with respect to the sharing of proceeds from sales within the Compact region of bulk milk, packaged milk, or producer milk originating from outside of the Compact region. The Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose. Establishment of a Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition of the marketing of milk."

The third and fourth sentences of the condition clearly must be read together. The express statement of the fourth sentence – that price regulation, in itself, shall not be considered a compensatory payment – strongly establishes that use of the remainder of the Compact's unconditioned regulatory provisions should not be construed as involving the use of "compensatory payments." In any event, the Commission concludes the last sentence establishes that petitioner's reading of the condition's intent is overbroad.

Most significantly, the condition in no way limits the additional, express, authority of the Commission to regulate "partially regulated plants", as provided by Compact § 10(7). As previously discussed, such plants as are those "being not located in a regulated area but having Class I distribution within such area...". § 10(7) expressly authorizes the "pricing and pooling of milk handled by" such plants.

The express inclusion of the one pricing mechanism of compensatory payments under §10(6), along with another, distinct, mechanism of "pricing and pooling of milk" immediately following under §10(7), establishes that the Compact as originally conceived contained *two* separate means to regulate milk brought into the regulated area from beyond the area. The phrasing of the second mechanism, premised upon the "pooling" of milk, establishes the critical distinction. Under §10(6), "persons who bring Class I milk into the regulated area" must "make compensatory payments to the extent necessary *to equalize* the cost of milk..." (Emphasis added) By contrast, under §10(7), "partially regulated plants" are made subject to provisions of "pricing *and pooling*". (Emphasis added)

Under §§ 9(6) and 10(7), partially regulated plants and pool plants can be made subject to the same regulatory provisions of pricing *and pooling* of milk with regard to the cost of all milk

marketed in the regulated area. This is the precise pattern of the Compact Over-order Price Regulation adopted by the Commission. As the Commission has found in Finding #24, both pool plants and partially regulated plants are subject to the identical compact over-order price obligation to the pool, and receive the identical compact over-order price credit from the pool, for milk marketed in the regulated area.

As set forth in Finding #24, for example, all pool plants *and* partially regulated plants were subject on August 18 to the identical $3.00 over-order obligation for their route distributions in the New England regulated area for July milk. Pool plants *and* partially regulated plants also received the same disbursement of the $1.28 over-order producer price on August 20. Similarly, all pool plants and partially regulated plants will be subject on October 18 to the (estimated) identical $1.63 over-order obligation for their route distributions in the New England regulated area for September milk. Pool plants and partially regulated plants will also receive the same disbursement of the (estimated) $0.72 over-order producer price on August 20.

This pattern of regulation is distinct from the compensatory payment pattern of regulation described by petitioner's Statement of Facts, and as authorized by § 10(6) of the Compact. Such a pattern requires persons bringing milk into the regulated area to make a payment into

the pool designed to "equalize" the cost for such milk against the cost paid by pool plants. As simply making an equalization payment, furthermore, such a person receives no credit from the pool for disbursement to supplying farmers. For example, such an equalization payment would have required petitioners on August 18 to make payment in some amount resembling $1.72 ($3.00 - $1.28 (debit – credit paid by and to pool plants)). According to this regulatory pattern, furthermore, petitioners would have received no over-order credit for disbursement to producers.

In sum, the Commission's regulatory pattern based on the full pooling of milk under §§ 9(d) and 10(7) of the Compact regulates milk marketed by partially regulated plants into the regulated area in the same manner as that marketed by pool plants. In both cases, all plants make full payment into the pool and receive payment back for that volume. For each plant operated by petitioners, rather than being in the regulated posture of a "person bringing milk into the regulated area", such plant is instead "partially regulated" under the Compact, for the volume of milk marketed in the area.

The distinction in the Compact as originally drafted between these two regulatory mechanisms may be a subtle one, but it is no less vital for that subtlety. Congress expressed its recognition of this original, two-fold, regulatory pattern in the manner by which it

consented to the Compact. In condition of consent (7), Congress at once disallowed the provision for use of compensatory payments provided by Compact §10(6) but left undisturbed the succeeding authority under §10(7) to price and pool milk by partially regulated pool plants.

For these reasons, the Commission rejects petitioners' contention that its regulation of "Class I milk produced... packaged and processed outside of New England but sold ...to New England customers" is an unlawful form of compensatory payment.

E. Economic Harm Alleged With Regard to the Regulation of Milk Produced and Processed Outside of the New England Regulated Area and Marketed in the Regulated Area

Petitioners have alleged that they will suffer economic harm as a result of the imposition of the Compact over-order price regulation on milk produced and processed outside of the New England regulated area and marketed in the regulated area. The mere assertions of harm are too general and are not substantiated with any specific evidence in petitioners' presentation.

Moreover, petitioners' allegations are merely predictions of what might happen in the future. See e.g. petitioners' Statement of Fact # 22: the "pricing rules *will* have the adverse impact of increased milk prices and other direct charges

to processors...; Statement of Fact # 25: "Higher consumer milk prices in New England *will* result in lower sales for processors...". (Emphasis added) These predictions are wholly conclusory and are not substantiated beyond the mere assertions. There are no actual facts presented in support of the conclusory assertions.

Finally, petitioners' alleged Statement of Fact # 24, that "[f]or partially regulated processors, the Compact over-order assessment for distribution into New England will increase raw product costs which are not applied to local competitors" is incorrect. As found in the Commission's Finding #24, partially regulated plants are subject to the same over-order obligation as pool plants, or those competitors located in New England.

For these reasons, the Commission concludes that the nature of petitioners' alleged claims of economic harm are not substantiated, are too speculative, and are too general to warrant granting the relief requested. As a fundamental principle of law, petitioners, as the moving parties, have the burden of producing evidence beyond the mere assertion of an alleged fact, to prove the fact asserted. The petitioners have not met that burden and the claims are rejected.

2. Authority to Regulate Class I Milk Produced Outside of New England but Packaged and Processed in New England

None of these petitioners challenge application of the Compact over-order price regulation on the operation of any plant which packages and processes milk in New England from producers outside of New England. Petitioners lack standing to raise the legal claims in Statement of Ground #2 and the claims and argument are, therefore, found to be irrelevant and immaterial.

3. Authority to Regulate Producer Milk Outside of Regulated Area

Petitioners claim that "the Compact Rules, as written or as applied to establish and directly regulate an "over-order" Class I plant price for milk received from producers other than those 'located in a regulated area,' are not authorized by and violate Compact § 9(d)." This legal claim is more fully developed in petitioners' Statement of the Facts #1 which asserts that the Commission's authority under §9(d) of the Compact is "limited to plants and 'other handlers receiving milk from producers located in a regulated area.'" (Emphasis by petitioners)

In its entirety, the pertinent first sentence of § 9(d) is as follows:

> "(d) The commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area."

Petitioners apparently read the last clause of the sentence – "receiving milk from producers located in a regulated area" - as modifying each of the preceding "pool plants" and "partially regulated plants" along with, generally, "all other handlers..." Petitioners' construction is inconsistent with the plain language, with basic "regulatory techniques historically associated with milk marketing", and with "commonly understood general meanings" of milk marketing under §3 of the Compact.

Consistent with the most logical reading of the statutory language and within commonly understood usage and intended purposes of milk market regulation, the language underlined by petitioner modifies only "all other handlers", and thereby defines a third, distinct, class of regulated entity. Accordingly, the Commission concludes that § 9(d) authorizes the Commission to establish compact over-order price regulation for three classes of regulated entities:

1) pool plants [as defined by Compact § 2(6)];

2) partially regulated plants [as defined by Compact § 2(7)]; and

3) all other handlers receiving milk from producers located in a regulated area.

§ 2(6) defines a pool plant as a "any milk plant located in a regulated area." Such "pool plants" are the fundamental "regulatory technique historically associated with milk marketing" contemplated therein by § 3(b) of the Compact. They provide the basic regulatory tool for establishing uniform price regulation for market distributions in a particular marketing area. For the New England marketing area, pool plants supply fully 97 percent of the packaged milk product. See Commission's Finding # 5.

In equally, fundamental, common usage, pool plants can only be understood to encompass supply from farms without regard to location of the farm. This is to ensure that all milk received by such a processing facility is uniformly regulated. If the distinction were drawn as argued by petitioners, some part of the supply to regulated facility would go unregulated, thus defeating the regulation's purpose of uniformity.

The Commission finds petitioners' construction of the definition of "partially regulated plants" similarly unsupportable as directly contrary their definition in § 2(7). Section 2(7) defines a partially regulated plant as a "milk plant not

located in a regulated area but having sales within such regulated area, *or* receipts in such area." (Emphasis added). Section 2(7)'s definition of partially regulated plant use of the conjunctive "and" to join the clause – "receipts from producers located in such area" - instead of the disjunctive "or" makes clear that the definition encompasses milk received from producers outside the regulated area.

Consistent with such common usage, § 9(d) expressly recognizes that all supply provided to a pool plant or partially regulated plant applies without regard to location of the supplying farm. Accordingly, § 9(d) establishes that

> Whenever [price regulation] has been established..., the legal obligation to pay such price shall be determined solely by the terms and purpose of the regulation without regard to the situs of the transfer of title, possession or any other factors not related to the purposes of the regulation and this compact.

Finally, the Commission notes the third class of such "other handlers receiving milk from producers located in a regulated area" includes cooperatives, or formal organizations of farmers. As farmer organizations for assembling and marketing milk, this class is distinguished from the processing facilities which make up the

other two classes of regulated entities - pool plants and partially regulated plants.

As set forth in Finding # 22, most of the farmers comprising the New England milkshed are organized in such cooperatives. The remainder is understood as comprised of "independent" producers. Within commonly understood terms of milk market regulation, processing facilities "receive" milk from independent producers and cooperatives. In the latter case, it is the cooperative which "receives" the milk from its producer members, within the meaning of § 9(d), and then markets the milk to the processing facility.

The Commission concludes that the language in §9(d) of the Compact "receiving milk from producers located in a regulated area" modifies only "all other handlers" as a separate category and does not apply to or limit the scope of the Commission's authority for regulating pool plants or partially regulated plants. On the basis of this plain reading of the statutory language, the Commission rejects the petitioners' claim.

4. Authority to Establish and Distribute Proceeds to Producers Outside the New England Regulated Area

A. Response to Petitioners' Legal Claim

Petitioners further argue that "the Compact Rules, as written or as applied to establish and distribute proceeds of a Compact over-order revenue pool applied to producers located without the regulated area, violate the limits of pooling authority contained in Compact Sec. 10(5)(A)."

Petitioners apparently are alleging in Conover's affidavit that § 10(5)(A) is the only mechanism provided for making disbursements to supplying farmers, whether inside or outside the regulated area. In fact, §§ 9 and 10 provide a number of options for payment.

The Commission finds that § 10(7) addresses the specific circumstance here complained of, with regard to payment to farmers located outside the regulated area supplying a plant also located outside such area. As discussed above, such plants are "partially regulated plants" under the definition of § 2(7). The Commission's regulatory provisions addressing the payment of all farmers supplying partially regulated plants, located both inside and outside the regulated area are premised primarily upon this statutory section.

Further, the intent of Congress in consenting to the Compact was that all farmers supplying regulated plants should receive the over-order producer price. The colloquy between Senators Leahy and Lugar quoted above indicates the intent that *"[t]he compact also provides that farmers from beyond New England receive its benefits as well as their New England counterparts."* 142 Cong. Rec. S3056 (Mar. 28, 1996).

The Commission finds that § 10(7) authorizes the adoption of "[p]rovisions specially governing the pricing and pooling of milk handled by partially regulated plants." The Commission, therefore, concludes that the statutory language of the Compact reinforced by the legislative history gives the Commission authority to distribute to producers outside of New England.

A. Allegations of Economic Harm Relating to Distribution of Proceeds to Producers Outside the New England Regulated Area

Petitioners present certain allegations of economic harm relating to distribution of proceeds to producers outside the New England regulated area. Petitioners' supporting affidavit by Mikael B. Pedersen contains the following statement that:

> "[d]uring the past several months, New England handlers and cooperative associations have been actively soliciting dairy farmers which supply milk to Crowley's New York plants with a promise of greater income if the producers switch allegiance to the New England/Compact market. Producers supplying Crowley, in addition, have advised that they will not continue to supply milk to Crowley unless Crowley is able to match the competitive price flowing to some New York producers from the New England Compact pool.

A new affidavit is also filed with petitioners' September 19 response by Gary Dake of Stewart's Processing Corp., indicating that Stewart's has been required to make such matching payments to retain its supply.

In the petitioners' September 19 response, they raise an additional, apparently new claim of economic harm with regard to matching payments. Petitioners assert that their raw product cost of milk *distributed in New York* is made higher than that of their New England competitors as a result of such payments. *See:* Petitioners' September 19 response, pages 8 and 9. Petitioners new, additional argument is in essence derived from the previous claim that they must match the regulation's rate of

payment to producers supplying New England based, or "pool plants". The additional claim is that such payments, if required to retain supply, serve to increase their procurement cost for milk sold in New York compared to the cost incurred by pool plants. The same issues are therefore raised by both claims of economic harm – whether petitioners must duplicate in some fashion the payments made to producers supplying pool plants for milk procured for ultimate sale in New York and, is so, whether petitioners are harmed by having to make such payments.

Petitioners' allegations of economic harm are again presented in conclusory, speculative form. Most significantly, there is no documentation in either cited affidavit of the number of supplying farms which petitioners have lost, much less any identification of the number of farms which might be lost. With regard to the Crowley Foods, Inc. and Stewart's Processing Corp. affidavits, there is simply no indication of just how many, if any, farms affiants might lose in fact. Nor is there any calculation of the relative percentage of such alleged vulnerable supply against petitioners' overall supply.

Petitioners' supporting affidavit by Conover is similarly speculative. While there is a theoretical description of the potential for market disruption (See paragraphs 23 through 28), there are no actual facts presented of such disruption. Rather, the argument is as is

generally presented in petitioners' Statement of Fact #23 that: "New York processors . . . will be adversely affected".

The speculative nature of such claims was highlighted in the Federal District Court's recent decision in this matter. The Court there *"conclude[d] that any harm to the plaintiffs from the August 20 distribution is speculative."* Order, August 13, 1997, *New York State Dairy Foods, Inc., et. al. v. Northeast Dairy Compact Commission, et. al.*, Civil Action No. 97-11576-PBS, at 3. The Court reached this conclusion by specific reference to analysis presented by the Compact Commission's Regulations Administrator, Carmen L. Ross, as follows:

> "Compact price regulation provides no incentive or basis for the New England-based plant to switch or add supply from a farmer associated with on of the plaintiffs [including the petitioner]. Based on the fundamental principle of marketing area-based pricing, the New England-based plant must always pay the same price for milk. Thus, there is no incentive for the New England-based plant to switch supply to that provided by a farmer associated with one of the plaintiffs [including the petitioner]. Indeed, to do so would likely mean disrupting well-established patterns of supply

> with individual farmers and cooperatives.
>
> Also, Ross points out that because there are ample supplies of milk, there should be no disruption." Id. at 3-4.

The other allegations are similarly speculative. *See* petitioners' Statement of Fact #26 "Higher producer prices will stimulate milk production in New England"; Statement of Fact #27: The market burdens and barriers to milk from New York...will also have the tendency to cause less Class I milk to flow to New England."

The Commission concludes that the speculative nature of petitioners' claims of economic harm in this regard are too speculative, standing alone, to warrant the granting of the relief granted by petitioners. The Commission again refers to the fundamental principle of law cited at p. 18 that petitioners, as moving parties, have a burden to produce evidence to substantiate an asserted fact. They have not met that burden and their claim that distribution of the proceeds of price regulations to producers in New York is, therefore, rejected.

Finally, to the extent that the petitioners are concerned that there might be unanticipated consequences in implementation of the over-order price regulation, the Commission notes [as it did in its final regulation, 62 F.R. 29626,

29638 (May 30, 1997)] that it is carefully monitoring the regulation and evaluating its effect on the market.

5. Authority for Administrative Assessment

A. Start up Assessment

The Commission found in Finding #26 that none of the petitioners was assessed for start-up costs. Accordingly, petitioners have no grounds to complain against the establishment or imposition of the start assessment.

B. Administrative Assessment

Petitioners claim that the Commission's authority to impose an assessment for administrative costs is limited. Unlike the language of § 18(a) that applies to start up assessments, the language referring to assessments for administrative purposes does not limit the Commission's authority as to duration, source or amount. The relevant language reads:

> "In addition, if regulations establishing an over-order price or a compact marketing order are adopted, they may include an assessment for the specific purpose of their administration."

The Commission concludes that the costs of administration of the Compact over-order price regulation were intended to be born by all handlers subject to the regulation with sales of Class I milk in the regulated region, including pool plants, partially regulated plants, and all other handlers receiving milk from producers located in the regulated area. The imposition of a $0.032/cwt. administrative assessment on petitioners for Class I sales in New England is well within the Commission's authority under § 18(a) of the Compact.

6. Imposition of Administrative Assessment Only on Class I Milk

Petitioners argue that the Compact over-order price regulation for application of the § 18(a) administrative assessment is inconsistent with the "blend price" assessment objectives of § 18(a) and with federal and state equal protection guarantees. Their argument is grounded on the assertion that there is no rational basis related to a legitimate state interest in requiring "the class most burdened by Compact regulation to bear all of the costs of administration, while other classes of milk users in New England (Class II, III, and III-A), which benefit equally from distribution of the pooled 'producer over-order price,' share in none of the costs of administration."

It is not apparent from the record that is before the Commission what the "'blend price'

assessment objectives of § 18(a)" might be. § 18(a) of the Compact 'limits the amount of any start-up assessment that the Commission might establish to "one-tenth of one percent of the applicable federal market order blend price per hundredweight of milk." While that language indicates clear legislative intent to limit the amount of the assessment, it is not clear that the federal market order blend price was chosen as a basis for calculation for any purpose other than ease of administration. Because there is no readily apparent "'blend price' assessment objective", the Commission finds no inconsistency with the implementing regulation.

In analyzing the petitioners' equal protection claim, the Commission notes that state and federal laws are generally entitled to a presumption of validity against attack under this clause. *Parham v. Hughes*, 441 U.S. 347 (1979). The petitioners have neither alleged nor shown that they are members of a protected or suspect class for purposes of equal protection analysis. *See: Harris v. McRae*, 448 U.S. 297 (1980), *McGowan v. Maryland*, 366 U.S. 340 (1961). They must, therefore, show that the discriminatory treatment alleged has no rational basis related to a legitimate state interest for purposes of finding any violation of their equal protection rights. *See: Kite v. Marshall* (CA, 1981) 661 F.2d 1027, rehearing denied 666 F.2d 591, cert. denied 457 U.S. 1120. *See also: Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) and *City of New Orleans v.*

Dukes, 427 U.S. 297 (1976). The petitioners have not met that burden.

The Congress, in its consent to the Northeast Interstate Dairy Compact, indicated a clear intention of authorizing over-order price regulation of only Class I fluid milk. *See:* § 147 (2) of the 1996 Farm Bill, 7 U.S.C. § 7256. This regulation is rationally related to the legitimate purpose of providing "a stable, local supply of pure, wholesome milk" as "a matter of great importance to the health and welfare of the region." *See:* § 1 of the Compact. The primary focus of the Compact and the over-order price regulation is on the Class I fluid milk market. It is eminently reasonable to assess the costs for administration of the regulatory program on those who distribute Class I milk in New England as a cost of doing business in the market.

The Commission concludes that the Compact rules are consistent with federal and state equal protection guarantees.

7. Composition of the Compact Commission

The petitioners argue that § 4 of the Compact, or its application by participating states, creating or providing a Commission with dairy farmer members and other members with substantial pecuniary and political interest in the establishment of an over-order pricing order,

violates due process mandated by the Fifth and Fourteenth Amendments of the Constitution of the United States and by the Constitutions of participating states.

As the indicated in Finding #7 above, the Commission finds that the Commission is made up of representatives of consumers, dairy farmers, dairy processors, and others. The mere assertion that the Commission includes interested parties does not provide sufficient foundation for invalidating an Act of Congress and the several states as violative of due process. *Schweiker v. McClure*, 456 U.S. 188, 196 n. 10 (1982). The Congress, [and] the several state legislatures and the appointing authorities chose to include dairy farmers and consumer representatives to ensure that the expertise of these groups was utilized by the Commission. That legislative and gubernatorial judgment is entitled to deference. Absent specific allegations of bias or irregularities, the mere presence of interested persons on governmental boards that regulate those persons' professions does not evidence bias and is not a violation of due process. *See: Friedman v. Rogers*, 440 U.S. 1, 18 (1979); *Abramson v. Gonzales*, 949 F.2d 1567, 1579 (11th Cir. 1992).

As the court pointed out in *Lopez v. Henry Phipps Plaza South*, 498 F.2d 937 (2nd Cir. 1974):

> "to forbid tribunals composed of individuals drawn from organizations interested in the matter being regulated on the ground of such interest would deny the tribunal valuable and perhaps otherwise unavailable expertise."

The Commission notes further that farmers have long played a part in the federal regulatory policy through participation on decision-making committees (S*ee, e.g.: Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S.Ct. 2130, 2136 (1997) and through producer referenda (*See, e.g.: Block v. Community Nutrition Institute,* 467 U.S. 340, 346 (1984).

Beyond this lack of general grounds for disqualifying farmer and other members of the Commission from participating in the establishment of an over-order price regulation, the petitioners have neither alleged specific facts nor submitted any evidence to prove any disqualifying bias or pecuniary interest beyond their merely conclusory statements in the petition and the September 19 response. The Commission concludes that the composition of the Commission, defined in § 4 of the Compact and as implemented by the participating states, is not in conflict with the due process requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States or of the several participating states' constitutions.

8. Appointment of the Hearing Panel

The Commission concludes that the provisions of the interim rule for appointment of the hearing panel for consideration of these petitions adequately ensure the petitioners a fair and impartial panel. The Chair of the Commission, in appointing the panel members pursuant to the requirements of 7 *CFR* §1301.4(a) by Order of August 19, 1997, has appointed no member with a pecuniary interest in the matter nor resident in the same state as any of the petitioners' principal place of business.

The law presumes the legitimacy of the appointment order and there is a "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Adjudicators are "assumed to be men *[sic]* of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstance." *U.S. v. Morgan*, 313 U.S. 409, 421 (1941). Philosophical or policy bias, a predisposition in favor of the law or regulation the agency enforces, for example, is not considered to be a disqualifying bias. *See: American Cyanamid v. F.T.C.*, 363 F.2d 757 (1966). *See also: Heffron and McFeeley, The Administrative Regulatory Process*, p. 274; and *Davis, 3 Administrative Law Treatise (1980)*, p. 362. Absent specific allegations and clear evidence of bias for any particular member,

recusal is not required. *Housing Study Group v. Kemp, Ibid.* Panel members have evidenced no disqualifying bias merely by their participation in voting as delegates on the Commission.

In its September 19 response, the petitioners have cited *New Hampshire Milk Dealers Association v. Milk Control Board, op. cit.*, for the proposition that panel members should recuse themselves in this case. In that case, however, the Court found that, because the Chair of the Milk Board had no pecuniary interest in the case, that he entertained no ill will or prejudice toward any of the parties, and that he had no bias or prejudgment concerning the issues of fact involved nor as to the outcome of the hearings, recusal was not necessary. In that case, as here, participation and advocacy in the legislative process was not sufficient alone to require disqualification.

The petitioners have demonstrated no specific grounds of pecuniary interest, prejudice toward a party, or bias beyond the mere conclusory statements in the petition and the September 19 response. The petitioners have not met their burden to show by "clear and convincing evidence" any such grounds.

9. Employee, Staff or Advisor Disqualification

The Commission concludes that, absent a specific allegation of bias or impropriety, the

staff is not disqualified from advising the panel or the Commission hearing these petitions. The same general considerations and presumptions discussed above on the qualification of Commission members to sit as members of the hearing panel apply to the Commission's staff and legal advisors who may assist the hearing panel, *See: Greenberg v. Federal Reserve Board*, 968 F.2d 164 (2nd Cir. 1992). The mere allegation, as outlined by petitioners in the September 19 response, that agency staff has advocated for the establishment of the Compact as a representative of producer organizations is not sufficient to disqualify. Again, absent specific allegations and "clear and convincing evidence" of bias for any particular staff person or legal advisor, disqualification or recusal is not required.

10. Application of the Administrative Procedure Acts

The Commission concludes that the provisions of the federal and applicable state Administrative Procedure Acts do not apply to these proceedings. On its face, the federal Administrative Procedure Act applies only to federal governmental agencies. The Compact Commission does not come within the definition of agency. *See:* 5 *U.S.C.* § 551. The rulemaking provisions of the Compact itself in § 11 make specific reference only to the informal rulemaking provisions of the federal APA, 5 *U.S.C.* § 553, for purposes of the rulemaking,

and the Commission has abided by those procedures in the rulemaking. Nowhere else does the Compact mention the federal or any state Administrative Procedure Act. Congressional and state legislative intent is then presumed to be that the provisions do not apply to these proceedings. *Inclusio unius, exclusio alterius.* Since the Commission has chosen not to apply APA provisions under its interim rule governing these administrative proceedings, 7 *CFR* § 1381 *et. seq.*, the provisions of the APAs do not apply.

While the Commission concludes that the specific statutory provisions of the Administrative Procedures Acts do not apply, it recognizes that common law requirements of due process do apply. The handler petition procedures provided under the Commission's interim rules provide adequate protection of petitioners' due process rights. *See: U. S. v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973).

III. Based on the above findings of fact and conclusions of law, the Commission orders the following:

A. Petitioners' prayer that the Commission find and declare that its milk pricing Rules, applied to persons who bring packaged Class I milk into New England, by exacting a charge on such packaged Class I milk produced on non-

New England dairy farms, and processed in non-New England milk plants:

(1) constitute a tariff or other burden on interstate commerce not permitted under Article I, § 8, of the Constitution of the United States, and for which Congress has not given its consent under Article I, § 10 of the Constitution;

(2) violate the geographic limitations of Congressional consent to the Compact, as described in § 147 of the 1996 Farm Bill;

(3) violate express prohibitions in § 147 of the 1996 Farm Bill against use of compensatory payments applied to out-of-region milk "for any purpose" and against any form of direct or indirect limitations on milk and milk products marketed to New England from other production areas; is denied.

B. Petitioners' prayer that the Commission find and declare that its milk pricing Rules, as applied to persons who bring bulk Class milk into New England, by exacting charges on such milk produced on non-New England dairy farms:

(1) constitute a tariff or other burden on interstate commerce not permitted under Article I, § 8 of the Constitution of the United States, and for which Congress has not given its consent under Article I, § 10 of the Constitution;

(2) violate the geographic limitations of Congressional consent to the Compact, as described in § 147 of the 1996 Farm Bill;

(3) violate express prohibitions in § 147 of the 1996 Farm Bill against use of compensatory payments applied to out-of-region milk "for any purpose" and against any form of direct or indirect limitations on milk and milk products marketed to New England from other production areas; is denied.

C. The petitioners' prayer that the Commission find and declare that its milk pricing Rules, as applied to milk received from producers located without the regulated area and to persons who bring such milk as packaged or bulk Class I milk into New England, by direct imposition of a "compact over-order price" on such persons, is not authorized by § 9(d) of the Compact which limits such over-order price regulation to milk received "from producers located in a regulated area" is denied.

D. The petitioners' prayer that the Commission find and declare that its milk price pooling and equalization rules, as applied to extend distribution of equalization pool proceeds to milk received from producers located without the regulated area and required to be paid through persons who bring such milk as packaged or bulk Class I milk into New England, is not authorized by § 10(5)(A) of the

Compact which limits distribution of any Compact over-order price revenue to "producers throughout the regulated area" is denied.

E. The petitioners' prayer that the Commission find and declare that the Compact rules assessing charges for costs of administration and for start-up costs, as applied to milk purchased from producers located outside of the regulated area is not authorized by § 18(a) of the Compact which limits such assessments to milk purchased by handlers "from producers within the region" is denied.

F. The petitioners' prayer that the Commission find and declare that the Compact rules assessing charges for cost of administration and for start-up costs, as applied to exclude or exempt New England handlers as to milk used for Class II, III or III-A purposes, violates § 18(a) of the Compact which provides for a uniform assessment collected from "each handler who purchases milk from producers within the region", not just Class I handlers and not just for Class I milk is denied.

G. Petitioners' prayer that the Commission find and declare that the Compact rules assessing charges for costs of administration and for start-up costs, as applied to exclude or exempt New England handlers as to milk used for Class II, III, or III-A purposes, violates equal protection guarantees of the United States

Constitution and of the Constitutions of each of the several New England states is denied.

H. Petitioners' prayer that the Commission find and declare § 4 of the Compact, or its application by the Compact participating states, creating or providing for a Commission with many dairy farmer members, and other persons with substantial pecuniary, personal or political interest in the establishment of an over-order pricing order, renders the Compact procedure and resulting Compact Rules in conflict with requirements of due process mandated by the Fifth Amendment to the United States Constitution and applicable to states pursuant to the Fourteenth Amendment to the United States Constitution, and/or as required by due process provisions of the Constitutions of the several Compact participating states is denied.

I. The petitioners' prayer that the Commission cease applying and/or enforcing each of the foregoing Compact rules and provisions as to milk from outside the region is denied.

J. The petitioners' further prayer that pursuant to 7 CFR § 1381.4, the Chair select from the Commission members a panel to adjudicate this matter, members of which:

(a) have no pecuniary interest in the distribution of Compact over-order producer prices;

(b) are not in direct or indirect competition with the petitioners or other processors or milk suppliers outside the New England region;

(c) have not, by their participation in the milk over-order pricing proceedings, by their state delegation vote, or otherwise, evidenced a bias or predisposition to establish, maintain, or defend a regulated Class I milk price in excess of that which the United States Secretary of Agriculture, in the Federal Milk Marketing Order Program, has found to be in the public interest was denied by the panel on August 25, 1997 and that denial is confirmed by the Commission.

K. Petitioners further request that no member, employee, staff or other person who participated in the deliberations concerning, and writing or promulgation of, the over-order price regulation be involved in advising or contacting the panel adjudicating this petition. The request was denied by the panel on August 25, 1997 and that denial is confirmed by the Commission.

L. Petitioners' request that members of the panel and any person participating in or advising the panel fully comply with the adjudicatory requirements of the federal Administrative Procedure Act and comparable state administrative procedure requirements

was denied on August 25, 1997 and that denial is confirmed by the Commission.

Entered this 23rd day of September, 1997

IT IS SO ORDERED
For the Commission:
Michael Wiers, Chair

APPENDIX D

TITLE 7 UNITED STATES CODE, SECTION 7526

NORTHEAST INTERSTATE DAIRY COMPACT. Congress hereby consents to the Northeast Interstate Dairy Compact entered into among the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont as specified in section 1(b) Senate Joint Resolution 28 of the 104th Congress, as placed on the calendar of the Senate, subject to the following conditions:

(1) FINDING OF COMPELLING PUBLIC INTEREST- Based upon a finding by the Secretary of a compelling public interest in the Compact region, the Secretary may grant the States that have ratified the Northeast Interstate Dairy Compact, as of the date of enactment of this title, the authority to implement the Northeast Interstate Dairy Compact.

(2) LIMITATION ON MANUFACTURING PRICE- The Northeast Interstate Dairy Compact Commission shall not regulate Class II, Class III, or Class III-A milk used for manufacturing purposes or any other milk, other than Class I (fluid) milk, as defined by a Federal milk marketing order issued under section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c) reenacted with amendments

by the Agricultural Marketing Agreement Act of 1937.

(3) DURATION- Consent for the Northeast Interstate Dairy Compact shall terminate concurrent with the Secretary's implementation of the dairy pricing and Federal milk marketing order consolidation and reforms under section 143.

(4) ADDITIONAL STATES- Delaware, New Jersey, New York, Pennsylvania, Maryland, and Virginia are the only additional States that may join the Northeast Interstate Dairy Compact, individually or otherwise, if upon entry the State is contiguous to a participating State and if Congress consents to the entry of the State into the Compact after the date of enactment of this title.

(5) COMPENSATION OF COMMODITY CREDIT CORPORATION- Before the end of each fiscal year that a Compact price regulation is in effect, the Northeast Interstate Dairy Compact Commission shall compensate the Commodity Credit Corporation for the cost of any purchases of milk and milk products by the Corporation that result from the projected rate of increase in milk production for the fiscal year within the Compact region in excess of the projected national average rate of the increase in milk production, as determined by the Secretary.

(6) MILK MARKETING ORDER ADMINISTRATOR- At the request of the Northeast Interstate Dairy Compact Commission, the Administrator of the applicable Federal milk marketing order issued under section 8(c)5 of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, shall provide technical assistance to the Compact Commission and be compensated for that assistance.

(7) FURTHER CONDITIONS- The Northeast Interstate Dairy Compact Commission shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area in the United States. The Compact Commission shall respect and abide by the ongoing procedures between Federal milk marketing orders with respect to the sharing of proceeds from sales within the Compact region of bulk milk, packaged milk, or producer milk originating from outside of the Compact region. The Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose. Establishment of a Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition on the marketing of milk.

APPENDIX E

Calendar No. 25

104th CONGRESS

1st Session

S. J. RES. 28

JOINT RESOLUTION

To grant consent of Congress to the Northeast Interstate Dairy Compact.

March 6, 1995

Read the second time and placed on the calendar

SJ 28 PCS

Calendar No. 25

104th CONGRESS

1st Session

S. J. RES. 28

To grant consent of Congress to the Northeast Interstate Dairy Compact.

IN THE SENATE OF THE UNITED STATES

March 2 (legislative day, FEBRUARY 22), 1995

Mr. JEFFORDS (for himself, Mr. LEAHY, Ms. SNOWE, Mr. KENNEDY, Mr. COHEN, Mr. GREGG, Mr. DODD, Mr. SMITH, Mr. CHAFEE, Mr. KERRY, Mr. LIEBERMAN, and Mr. PELL) introduced the following joint resolution; which was read the first time

March 6, 1995

Read the second time and placed on the calendar

JOINT RESOLUTION

To grant consent of Congress to the Northeast Interstate Dairy Compact.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CONGRESSIONAL CONSENT.

(a) CONSENT OF CONGRESS- Congress hereby consents to the Northeast Interstate Dairy Compact entered into among the States of Vermont, New Hampshire, Maine, Connecticut, Rhode Island, and Massachusetts, subject to the following conditions:

(1) LIMITATION OF MANUFACTURING PRICE REGULATION- The compact Commission may not regulate Class II, Class III, or Class III-A milk used for manufacturing purposes or any other milk, other than Class I, or fluid milk, as defined by a Federal milk marketing order issued under section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Act of 1937 (referred to in this title as 'Federal milk marketing order') unless both Houses of Congress have first consented to and approved such authority by a law enacted after the date of enactment of this joint resolution.

(2) ADDITIONAL STATES- Delaware, New Jersey, New York, Pennsylvania, Maryland, and Virginia are the only additional States that may join the compact, individually or otherwise, if on entry the additional States are contiguous to participating States and only if both Houses of Congress have first consented to and approved the additional States by a law enacted after the date of the enactment of this joint resolution.

(3) OUT-OF-REGION PRODUCERS- When a compact over-order price is in effect, the compact Commission shall pay producers whose Class I milk is pooled with partially regulated pool plants for sale in the compact region an over-order price equal to the over-order price received by producers whose Class I milk is pooled with pool plants.

(4) REMOVING INCENTIVES FOR OVERPRODUCTION- The compact Commission shall develop and implement a plan to ensure that the over-order price does not create an incentive for producers to generate additional supplies of milk.

(5) LIMITATION ON COMMISSION PRICING AUTHORITY- The maximum amount of the compact over-order price identified in section 9(b) of the compact refers to, and shall mean, the combined

amount of the applicable, Federal milk marketing order Class I price plus the regulated amount above the Federal milk marketing order Class I price established by the compact Commission.

(6) REGULATION OF COMPACT OVER-ORDER PRICE, ASSESSMENT ON PROCESSORS, AND DISBURSEMENT TO PRODUCERS- The compact Commission shall administer any compact over-order price by a pooling mechanism. Compensatory payments under section 10(6) of the compact shall be utilized only when the Commission determines, on consultation with the applicable processor, that the use of the pooling mechanism would not be feasible or economical for the processor and the Commission. In making its determination, the Commission shall ensure that the utilization of compensatory payments will not create a competitive disadvantage for any processor or producer.

(7) COMPETITIVE CREDITS- Competitive credits shall be used only in a manner consistent with their use in the Federal milk marketing orders.

(8) EFFECT ON FEDERAL MARKET ORDER CLASS I PRICE- A compact over-order price shall have no effect on any applicable Federal milk marketing order

Class I price. Any difference between or among the federally established Class I prices for milk subject to a compact over-order price shall remain unaffected by imposition of the over-order price.

(b) COMPACT- The compact is substantially as follows:

"ARTICLE I. STATEMENT OF PURPOSE, FINDINGS AND DECLARATION OF POLICY

"Sec. 1. STATEMENT OF PURPOSE, FINDINGS AND DECLARATION OF POLICY

"The purpose of this compact is to recognize by constitutional prerequisite the interstate character of the northeast dairy industry and to form an interstate commission for the northeast region. The mission of the commission is to take such steps as are necessary to assure the continued viability of dairy farming in the northeast, and to assure consumers of an adequate, local supply of pure and wholesome milk.

"The participating states find and declare that the dairy industry is the paramount agricultural activity of the northeast. Dairy farms, and associated suppliers, marketers, processors and retailers, are an integral component of the region's economy. Their ability to provide a stable, local supply of

pure, wholesome milk is a matter of great importance to the health and welfare of the region.

"The participating states further find that dairy farms are essential to the region's rural communities and character. The farms preserve open spaces, sculpt the landscape and provide the land base for a diversity of recreational pursuits. In defining the rural character of our communities and landscape, dairy farms also provide a major draw for our tourist industries.

"By entering into this compact, the participating states affirm that their ability to regulate the price which northeast dairy farmers receive for their product is essential to the public interest. Assurance of a fair and equitable price for dairy farmers ensures their ability to provide milk to the market and the vitality of the northeast dairy industry, with all the associated benefits.

"Recent, dramatic price fluctuations, with a pronounced downward trend, threaten the viability and stability of the northeast dairy region. Historically, individual state regulatory action has been an effective emergency remedy available to farmers confronting a distressed market. The federal order system, implemented by the Agricultural Marketing Agreement Act of 1937, establishes only minimum prices for

dairy products, without preempting the power of states to regulate milk prices above the minimum levels so established. Based on this authority, each state in the region has individually attempted to implement at least one regulatory program in response to the current dairy industry crisis.

"In today's regional dairy marketplace, cooperative, rather than individual state action may address more effectively the market disarray. Under our constitutional system, properly authorized, states acting cooperatively may exercise more power to regulate interstate commerce than they may assert individually without such authority. For this reason, the participating states invoke their authority to act in common agreement, with the consent of Congress, under the compact clause of the Constitution.

"In establishing their constitutional regulatory authority over the region's fluid milk market by this compact, the participating states declare their purpose that this compact neither displace the federal order system nor encourage the merging of federal orders. Specific provisions of the compact itself set forth this basic principle.

"Designed as a flexible mechanism able to adjust to changes in a regulated marketplace, the compact also contains a

contingency provision should the federal order system be discontinued. In that event, the interstate commission is authorized to regulate the marketplace in replacement of the order system. This contingent authority does not anticipate such a change, however, and should not be so construed. It is only provided should developments in the market other than establishment of this compact result in discontinuance of the order system.

"ARTICLE II. DEFINITIONS AND RULES OF CONSTRUCTION

"Sec. 2. DEFINITIONS

"For the purposes of this compact, and of any supplemental or concurring legislation enacted pursuant thereto, except as may be otherwise required by the context:

"(1) 'Commission' means the commission established by this compact.

"(2) 'Compact' means this interstate compact.

"(3) 'Region' means the territorial limits of the states which are or become parties to this compact.

"(4) 'Participating state' means a state which has become a party to this compact

by the enactment of concurring legislation.

"(5) 'Regulated area' means any area within the region governed by and defined in regulations establishing a compact over-order price or commission marketing order.

"(6) 'Pool plant' means any milk plant located in a regulated area.

"(7) 'Partially regulated plant' means a milk plant not located in a regulated area but having Class I distribution within such area, or receipts from producers located in such area. Commission regulations may exempt plants having such distribution or receipts in amounts less than the limits defined therein.

"(8) 'Compact over-order price' means a minimum price required to be paid to producers for Class I milk established by the commission in regulations adopted pursuant to sections nine and ten of this compact, which is above the price established in federal marketing orders or by state farm price regulation in the regulated area. Such price may apply throughout the region or in any part or parts thereof as defined in the regulations of the commission.

"(9) 'Commission marketing order' means regulations adopted by the commission pursuant to sections nine and ten of this compact in place of a terminated federal marketing order or state dairy regulation. Such order may apply throughout the region or in any part or parts thereof as defined in the regulations of the commission. Such order may establish minimum prices for any or all classes of milk.

"(10) 'Milk' means the lacteal secretion of cows and includes all skim, butterfat, or other constituents obtained from separation or any other process. The term is used in its broadest sense and may be further defined by the commission for regulatory purposes.

"(11) 'Class I milk' means milk disposed of in fluid form or as a fluid milk product, subject to further definition in accordance with the principles expressed in subdivision (b) of section three.

"(12) 'State dairy regulation' means any state regulation of dairy prices, and associated assessments, whether by statute, marketing order or otherwise.

"Sec. 3. RULES OF CONSTRUCTION

"(a) This compact shall not be construed to displace existing federal milk marketing orders or state dairy regulation in the region but to supplement them. In the event some or all federal orders in the region are discontinued, the compact shall be construed to provide the commission the option to replace them with one or more commission marketing orders pursuant to this compact.

"(b) This compact shall be construed liberally in order to achieve the purposes and intent enunciated in section one. It is the intent of this compact to establish a basic structure by which the commission may achieve those purposes through the application, adaptation and development of the regulatory techniques historically associated with milk marketing and to afford the commission broad flexibility to devise regulatory mechanisms to achieve the purposes of this compact. In accordance with this intent, the technical terms which are associated with market order regulation and which have acquired commonly understood general meanings are not defined herein but the commission may further define the terms used in this compact and develop additional concepts and define additional terms as it may find appropriate to achieve its purposes.

"ARTICLE III. COMMISSION ESTABLISHED

"Sec. 4. COMMISSION ESTABLISHED

"There is hereby created a commission to administer the compact, composed of delegations from each state in the region. A delegation shall include not less than three nor more than five persons. Each delegation shall include at least one dairy farmer who is engaged in the production of milk at the time of appointment or reappointment, and one consumer representative. Delegation members shall be residents and voters of, and subject to such confirmation process as is provided for in, the appointing state. Delegation members shall serve no more than three consecutive terms with no single term of more than four years, and be subject to removal for cause. In all other respects, delegation members shall serve in accordance with the laws of the state represented. The compensation, if any, of the members of a state delegation shall be determined and paid by each state, but their expenses shall be paid by the commission. Each state delegation shall be entitled to one vote in the conduct of the commission's affairs.

"Sec. 5. VOTING REQUIREMENTS

"All actions taken by the commission, except for the establishment or termination of an over-order price or commission

marketing order, and the adoption, amendment or rescission of the commission's bylaws, shall be by majority vote of the delegations present. Establishment or termination of an over-order price or commission marketing order shall require at least a two-thirds vote of the delegations present. The establishment of a regulated area which covers all or part of a participating state shall require also the affirmative vote of that state's delegation. A majority of the delegations from the participating states shall constitute a quorum for the conduct of the commission's business.

"Sec. 6. ADMINISTRATION AND MANAGEMENT

"(a) The commission shall elect annually from among the members of the participating state delegations a chairperson, a vice-chairperson, and a treasurer. The commission shall appoint an executive director and fix his or her duties and compensation. The executive director shall serve at the pleasure of the commission, and, together with the treasurer, shall be bonded in an amount determined by the commission. The commission may establish through its by-laws an executive committee composed of one member elected by each delegation.

"(b) The commission shall adopt by-laws for the conduct of its business by a two-thirds vote, and shall have the power by the same vote to amend and rescind these by-laws. The commission shall publish its by-laws in convenient form with the appropriate agency or officer in each of the participating states. The by-laws shall provide for appropriate notice to the delegations of all commission meetings and hearings and of the business to be transacted at such meetings or hearings. Notice also shall be given to other agencies or officers of participating states as provided by the laws of those states.

"(c) The commission shall file an annual report with the Secretary of Agriculture of the United States, and with each of the participating states by submitting copies to the governor, both houses of the legislature, and the head of the state department having responsibilities for agriculture.

"(d) In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power--

"(1) to sue and be sued in any state or federal court;

"(2) to have a seal and alter the same at pleasure;

"(3) to acquire, hold, and dispose of real and personal property by gift, purchase, lease, license, or other similar manner, for its corporate purposes;

"(4) to borrow money and to issue notes, to provide for the rights of the holders thereof and to pledge the revenue of the commission as security therefor, subject to the provisions of section eighteen of this compact;

"(5) to appoint such officers, agents, and employees as it may deem necessary, prescribe their powers, duties, and qualifications; and

"(6) to create and abolish such offices, employments, and positions as it deems necessary for the purposes of the compact and provide for the removal, term, tenure, compensation, fringe benefits, pension, and retirement rights of its officers and employees. The commission may also retain personal services on a contract basis.

"Sec. 7. RULEMAKING POWER

"In addition to the power to promulgate a compact over-order price or commission marketing orders as provided by this compact, the commission is further empowered to make and enforce such

additional rules and regulations as it deems necessary to implement any provisions of this compact, or to effectuate in any other respect the purposes of this compact.

"ARTICLE IV. POWERS OF THE COMMISSION

"Sec. 8. POWERS TO PROMOTE REGULATORY UNIFORMITY, SIMPLICITY, AND INTERSTATE COOPERATION

"The commission is hereby empowered to:

"(1) Investigate or provide for investigations or research projects designed to review the existing laws and regulations of the participating states, to consider their administration and costs, to measure their impact on the production and marketing of milk and their effects on the shipment of milk and milk products within the region.

"(2) Prepare and transmit to the participating states model dairy laws and regulations dealing with the inspection of farms and plants, sanitary codes, labels for dairy products and their imitations, standards for dairy products, license standards, producer security programs, and fair trade laws.

"(3) Study and recommend to the participating states joint or cooperative programs for the administration of the

dairy laws and regulations and to prepare estimates of cost savings and benefits of such programs.

"(4) Encourage the harmonious relationships between the various elements in the industry for the solution of their material problems. Conduct symposiums or Conferences designed to improve industry relations, or a better understanding of problems.

"(5) Prepare and release periodic reports on activities and results of the commission's efforts to the participating states.

"(6) Review the existing marketing system for milk and milk products and recommend changes in the existing structure for assembly and distribution of milk which may assist, improve, or promote more efficient assembly and distribution of milk.

"(7) Investigate costs and charges for producing, hauling, handling, processing, distributing, selling and for all other services performed with respect to milk.

"(8) Examine current economic forces affecting producers, probable trends in production and consumption, the level of dairy farm prices in relation to costs, the

financial conditions of dairy farmers, and the need for an emergency order to relieve critical conditions on dairy farms.

"Sec. 9. EQUITABLE FARM PRICES

"(a) The powers granted in this section and section ten shall apply only to the establishment of a compact over-order price, so long as federal milk marketing orders remain in effect in the region. In the event that any or all such orders are terminated, this article shall authorize the commission to establish one or more commission marketing orders, as herein provided, in the region or parts thereof as defined in the order.

"(b) A compact over-order price established pursuant to this section shall apply only to Class I milk. Such over-order price shall not exceed one dollar fifty cents per gallon. Beginning in nineteen hundred ninety, and using that year as a base, the foregoing one dollar fifty cents per gallon maximum shall be adjusted annually by the rate of change in the Consumer Price Index as reported by the Bureau of Labor Statistics of the United States Department of Labor. For purposes of the pooling and equalization of an over-order price, the value of milk used in other use classifications shall be calculated at the appropriate class price established pursuant to the applicable federal order or state dairy regulation and the value of unregulated milk

shall be calculated in relation to the nearest prevailing class price in accordance with and subject to such adjustments as the commission may prescribe in regulations.

"(c) A commission marketing order shall apply to all classes and uses of milk.

"(d) The commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area. This price shall be established either as a compact over-order price or by one or more commission marketing orders. Whenever such a price has been established by either type of regulation, the legal obligation to pay such price shall be determined solely by the terms and purpose of the regulation without regard to the situs of the transfer of title, possession or any other factors not related to the purposes of the regulation and this compact. Producer-handlers as defined in an applicable federal market order shall not be subject to a compact over-order price. The commission shall provide for similar treatment of producer-handlers under commission marketing orders.

"(e) In determining the price, the commission shall consider the balance between production and consumption of milk and milk products in the regulated area, the costs

of production including, but not limited to the price of feed, the cost of labor including the reasonable value of the producer's own labor and management, machinery expense, and interest expense, the prevailing price for milk outside the regulated area, the purchasing power of the public and the price necessary to yield a reasonable return to the producer and distributor.

"(f) When establishing a compact over-order price, the commission shall take such action as necessary and feasible to ensure that the over-order price does not create an incentive for producers to generate additional supplies of milk.

"(g) The commission shall whenever possible enter into agreements with state or federal agencies for exchange of information or services for the purpose of reducing regulatory burden and cost of administering the compact. The commission may reimburse other agencies for the reasonable cost of providing these services.

"Sec. 10. OPTIONAL PROVISIONS FOR PRICING ORDER

"Regulations establishing a compact over-order price or a commission marketing order may contain, but shall not be limited to, any of the following:

"(1) Provisions classifying milk in accordance with the form in which or purpose for which it is used, or creating a flat pricing program.

"(2) With respect to a commission marketing order only, provisions establishing or providing a method for establishing separate minimum prices for each use classification prescribed by the commission, or a single minimum price for milk purchased from producers or associations of producers.

"(3) With respect to an over-order minimum price, provisions establishing or providing a method for establishing such minimum price for Class I milk.

"(4) Provisions for establishing either an over-order price or a commission marketing order may make use of any reasonable method for establishing such price or prices including flat pricing and formula pricing. Provision may also be made for location adjustments, zone differentials and for competitive credits with respect to regulated handlers who market outside the regulated area.

"(5) Provisions for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective

of the uses made of such milk by the individual handler to whom it is delivered, or for the payment of producers delivering milk to the same handler of uniform prices for all milk delivered by them.

"(A) With respect to regulations establishing a compact over-order price, the commission may establish one equalization pool within the regulated area for the sole purpose of equalizing returns to producers throughout the regulated area.

"(B) With respect to any commission marketing order, as defined in section two, subdivision nine, which replaces one or more terminated federal orders or state dairy regulation, the marketing area of now separate state or federal orders shall not be merged without the affirmative consent of each state, voting through its delegation, which is partly or wholly included within any such new marketing area.

"(6) Provisions requiring persons who bring Class I milk into the regulated area to make compensatory payments with respect to all such milk to the extent necessary to equalize the cost of milk purchased by handlers subject to a compact over-order price or commission marketing order. No such provisions shall

discriminate against milk producers outside the regulated area. The provisions for compensatory payments may require payment of the difference between the Class I price required to be paid for such milk in the state of production by a federal milk marketing order or state dairy regulation and the Class I price established by the compact over-order price or commission marketing order.

"(7) Provisions specially governing the pricing and pooling of milk handled by partially regulated plants.

"(8) Provisions requiring that the account of any person regulated under a compact over-order price shall be adjusted for any payments made to or received by such persons with respect to a producer settlement fund of any federal or state milk marketing order or other state dairy regulation within the regulated area.

"(9) Provisions requiring the payment by handlers of an assessment to cover the costs of the administration and enforcement of such order pursuant to Article VII, Section 18(a).

"(10) Provisions for reimbursement to participants of the Women, Infants and Children Special Supplemental Food

Program of the United States Child Nutrition Act of 1966.

"(11) Other provisions and requirements as the commission may find are necessary or appropriate to effectuate the purposes of this compact and to provide for the payment of fair and equitable minimum prices to producers.

"ARTICLE V. RULEMAKING PROCEDURE

"Sec. 11. RULEMAKING PROCEDURE

"Before promulgation of any regulations establishing a compact over-order price or commission marketing order, including any provision with respect to milk supply under subsection 9(f), or amendment thereof, as provided in Article IV, the commission shall conduct an informal rulemaking proceeding to provide interested persons with an opportunity to present data and views. Such rulemaking proceeding shall be governed by section four of the Federal Administrative Procedure Act, as amended (5 U.S.C. Sec. 553). In addition, the commission shall, to the extent practicable, publish notice of rulemaking proceedings in the official register of each participating state. Before the initial adoption of regulations establishing a compact over-order price or a commission marketing order and thereafter before any amendment with regard to prices or

assessments, the commission shall hold a public hearing. The commission may commence a rulemaking proceeding on its own initiative or may in its sole discretion act upon the petition of any person including individual milk producers, any organization of milk producers or handlers, general farm organizations, consumer or public interest groups, and local, state or federal officials.

"Sec. 12. FINDINGS AND REFERENDUM

"(a) In addition to the concise general statement of basis and purpose required by section 4(b) of the Federal Administrative Procedure Act, as amended (5 U.S.C. Sec. 553(c)), the commission shall make findings of fact with respect to:

"(1) Whether the public interest will be served by the establishment of minimum milk prices to dairy farmers under Article IV.

"(2) What level of prices will assure that producers receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.

"(3) Whether the major provisions of the order, other than those fixing minimum milk prices, are in the public

interest and are reasonably designed to achieve the purposes of the order.

"(4) Whether the terms of the proposed regional order or amendment are approved by producers as provided in section thirteen.

"Sec. 13. PRODUCER REFERENDUM

"(a) For the purpose of ascertaining whether the issuance or amendment of regulations establishing a compact over-order price or a commission marketing order, including any provision with respect to milk supply under subsection 9(f), is approved by producers, the commission shall conduct a referendum among producers. The referendum shall be held in a timely manner, as determined by regulation of the commission. The terms and conditions of the proposed order or amendment shall be described by the commission in the ballot used in the conduct of the referendum, but the nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto.

"(b) An order or amendment shall be deemed approved by producers if the commission determines that it is approved by at least two-thirds of the voting producers who, during a representative period determined by

the commission, have been engaged in the production of milk the price of which would be regulated under the proposed order or amendment.

"(c) For purposes of any referendum, the commission shall consider the approval or disapproval by any cooperative association of producers, qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the Capper-Volstead Act, bona fide engaged in marketing milk, or in rendering services for or advancing the interests of producers of such commodity, as the approval or disapproval of the producers who are members or stockholders in, or under contract with, such cooperative association of producers, except as provided in subdivision (1) hereof and subject to the provisions of subdivisions (2) through (5) hereof.

"(1) No cooperative which has been formed to act as a common marketing agency for both cooperatives and individual producers shall be qualified to block vote for either.

"(2) Any cooperative which is qualified to block vote shall, before submitting its approval or disapproval in any referendum, give prior written notice to each of its members as to whether and how it intends to cast its vote. The notice

shall be given in a timely manner as established, and in the form prescribed, by the commission.

"(3) Any producer may obtain a ballot from the commission in order to register approval or disapproval of the proposed order.

"(4) A producer who is a member of a cooperative which has provided notice of its intent to approve or not to approve a proposed order, and who obtains a ballot and with such ballot expresses his approval or disapproval of the proposed order, shall notify the commission as to the name of the cooperative of which he or she is a member, and the commission shall remove such producer's name from the list certified by such cooperative with its corporate vote.

"(5) In order to insure that all milk producers are informed regarding a proposed order, the commission shall notify all milk producers that an order is being considered and that each producer may register his approval or disapproval with the commission either directly or through his or her cooperative.

"Sec. 14. TERMINATION OF OVER-ORDER PRICE OR MARKETING ORDER

"(a) The commission shall terminate any regulations establishing an over-order price or commission marketing order issued under this article whenever it finds that such order or price obstructs or does not tend to effectuate the declared policy of this compact.

"(b) The commission shall terminate any regulations establishing an over-order price or a commission marketing order issued under this article whenever it finds that such termination is favored by a majority of the producers who, during a representative period determined by the commission, have been engaged in the production of milk the price of which is regulated by such order; but such termination shall be effective only if announced on or before such date as may be specified in such marketing agreement or order.

"(c) The termination or suspension of any order or provision thereof, shall not be considered an order within the meaning of this article and shall require no hearing, but shall comply with the requirements for informal rulemaking prescribed by section four of the Federal Administrative Procedure Act, as amended (5 U.S.C. Sec. 553).

"ARTICLE VI. ENFORCEMENT

"Sec. 15. RECORDS, REPORTS, ACCESS TO PREMISES

"(a) The commission may by rule and regulation prescribe record keeping and reporting requirements for all regulated persons. For purposes of the administration and enforcement of this compact, the commission is authorized to examine the books and records of any regulated person relating to his or her milk business and for that purpose, the commission's properly designated officers, employees, or agents shall have full access during normal business hours to the premises and records of all regulated persons.

"(b) Information furnished to or acquired by the commission officers, employees, or its agents pursuant to this section shall be confidential and not subject to disclosure except to the extent that the commission deems disclosure to be necessary in any administrative or judicial proceeding involving the administration or enforcement of this compact, an over-order price, a compact marketing order, or other regulations of the commission. The commission may promulgate regulations further defining the confidentiality of information pursuant to this section. Nothing in this section shall be deemed to prohibit (i) the issuance of general statements based

upon the reports of a number of handlers, which do not identify the information furnished by any person, or (ii) the publication by direction of the commission of the name of any person violating any regulation of the commission, together with a statement of the particular provisions violated by such person.

"(c) No officer, employee, or agent of the commission shall intentionally disclose information, by inference or otherwise, which is made confidential pursuant to this section. Any person violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office. The commission shall refer any allegation of a violation of this section to the appropriate state enforcement authority or United States Attorney.

"Sec. 16. SUBPOENA, HEARINGS AND JUDICIAL REVIEW

"(a) The commission is hereby authorized and empowered by its members and its properly designated officers to administer oaths and issue subpoenas throughout all signatory states to compel the attendance of witnesses and the giving of testimony and the production of other evidence.

"(b) Any handler subject to an order may file a written petition with the commission stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the commission. After such hearing, the commission shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

"(c) The district courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within thirty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the commission by delivering to it a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the commission with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subdivision shall

not impede, hinder, or delay the commission from obtaining relief pursuant to section seventeen. Any proceedings brought pursuant to section seventeen (except where brought by way of counterclaim in proceedings instituted pursuant to this section) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this section.

"Sec. 17. ENFORCEMENT WITH RESPECT TO HANDLERS

"(a) Any violation by a handler of the provisions of regulations establishing an over-order price or a commission marketing order, or other regulations adopted pursuant to this compact shall:

"(1) Constitute a violation of the laws of each of the signatory states. Such violation shall render the violator subject to a civil penalty in an amount as may be prescribed by the laws of each of the participating states, recoverable in any state or federal court of competent jurisdiction. Each day such violation continues shall constitute a separate violation.

"(2) Constitute grounds for the revocation of license or permit to engage

in the milk business under the applicable laws of the participating states.

"(b) With respect to handlers, the commission shall enforce the provisions of this compact, regulations establishing an over-order price, a commission marketing order or other regulations adopted hereunder by:

"(1) Commencing an action for legal or equitable relief brought in the name of the commission in any state or federal court of competent jurisdiction; or

"(2) With the agreement of the appropriate state agency of a participating state, by referral to the state agency for enforcement by judicial or administrative remedy.

"(c) With respect to handlers, the commission may bring an action for injunction to enforce the provisions of this compact or the order or regulations adopted thereunder without being compelled to allege or prove that an adequate remedy of law does not exist.

"ARTICLE VII. FINANCE

"Sec. 18. FINANCE OF START-UP AND REGULAR COSTS

"(a) To provide for its start-up costs, the commission may borrow money pursuant to its general power under section six, subdivision (d), paragraph four. In order to finance the costs of administration and enforcement of this compact, including payback of start-up costs, the commission is hereby empowered to collect an assessment from each handler who purchases milk from producers within the region. If imposed, this assessment shall be collected on a monthly basis for up to one year from the date the commission convenes, in an amount not to exceed one-tenth of one percent of the applicable federal market order blend price per hundredweight of milk purchased from producers during the period of the assessment. The initial assessment may apply to the projected purchases of handlers for the two-month period following the date the commission convenes. In addition, if regulations establishing an over-order price or a compact marketing order are adopted, they may include an assessment for the specific purpose of their administration. These regulations shall provide for establishment of a reserve for the commission's ongoing operating expenses.

"(b) The commission shall not pledge the credit of any participating state or of the United States. Notes issued by the commission and all other financial obligations incurred by it, shall be its sole responsibility and no participating state or the United States shall be liable therefor.

"Sec. 19. AUDIT AND ACCOUNTS

"(a) The commission shall keep accurate accounts of all receipts and disbursements, which shall be subject to the audit and accounting procedures established under its rules. In addition, all receipts and disbursements of funds handled by the commission shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become part of the annual report of the commission.

"(b) The accounts of the commission shall be open at any reasonable time for inspection by duly constituted officers of the participating states and by any persons authorized by the commission.

"(c) Nothing contained in this article shall be construed to prevent commission compliance with laws relating to audit or inspection of accounts by or on behalf of any participating state or of the United States.

"ARTICLE VIII. ENTRY INTO FORCE; ADDITIONAL MEMBERS AND WITHDRAWAL

"Sec. 20. ENTRY INTO FORCE; ADDITIONAL MEMBERS

"The compact shall enter into force effective when enacted into law by any three states of the group of states composed of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Virginia, and when the consent of Congress has been obtained. This compact shall also be open to states which are contiguous to any of the named states and open to states which are contiguous to participating states.

"Sec. 21. WITHDRAWAL FROM COMPACT

"Any participating state may withdraw from this compact by enacting a statute repealing the same, but no such withdrawal shall take effect until one year after notice in writing of the withdrawal is given to the commission and the governors of all other participating states. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

"Sec. 22. SEVERABILITY

"If any part or provision of this compact is adjudged invalid by any court, such

judgment shall be confined in its operation to the part or provision directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this compact.

"Congress reserves the right to amend or rescind this interstate compact at any time."

SEC. 2. RESERVATION OF RIGHTS.

(a) IN GENERAL- The right to alter, amend, or repeal this Act is expressly reserved.

(b) COMPENSATION REQUIREMENT- When an over-order price is in effect, the Commission established in this compact shall compensate the Commodity Credit Corporation before the end of the fiscal year for the cost of any increased Commodity Credit Corporation dairy purchases that result from projected increased fluid milk production for that fiscal year within the Compact region in excess of the national average rate of increase.

APPENDIX F

CODE OF FEDERAL REGULATIONS
TITLE 7--AGRICULTURE
CHAPTER XIII--NORTHEAST DAIRY COMPACT COMMISSION

PART 1301--DEFINITIONS

Sec. 1301.1 Compact. Compact means the Northeast Dairy Compact as approved by section 147 of the Federal Agriculture Improvement and Reform Act (Fair Act), Pub. L. 104-127.

Sec. 1301.2 Commission. Commission means the commission established by the Northeast Dairy Compact.

Sec. 1301.3 Northeast Dairy Compact Regulated Area. Northeast Dairy Compact Regulated Area hereinafter called the Regulated Area means all territory within the boundaries of the states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. All waterfront facilities connected therewith and craft moored thereat, and all territory therein occupied by any governmental installation, institution, or other similar establishment.

Sec. 1301.4 Plant. Plant means the land and buildings, together with their surroundings, facilities and equipment, whether owned or operated by one or more persons, constituting a

single operating unit or establishment for the receiving, processing or packaging of milk or milk products. The term plant shall not include:

(a) Distribution points (separate premises used primarily for the transfer to vehicles of packaged fluid milk products moved there from processing and packaging plants); or

(b) Bulk reload points (separate premises used for the purpose of transferring bulk milk from one tank truck to another tank truck while en route from dairy farmers' farms to a plant). If stationary storage tanks are used for transferring milk at the premises, the operator of the facility shall make an advance written request to the compact commission that the facility be treated as a reload point; otherwise it shall be a plant. The cooling of milk, collection or testing of samples, and washing and sanitizing of tank trucks at the premises shall not disqualify it as a bulk reload point.

Sec. 1301.5 Pool plant. Pool plant means any milk plant located in the regulated area.

Sec. 1301.6 Partially regulated plant. Partially regulated plant means a milk plant not located in the regulated area but having Class I distribution in the regulated area, or receipts from producers located in the regulated area.

Sec. 1301.7 Non pool plant. Non pool plant means any milk plant that is not a pool plant pursuant to section 1301.5 and not a partially regulated plant pursuant to section 1301.6.

Sec. 1301.8 Milk. Milk means the lacteal secretion of cows and includes all skim, butterfat, or other constituents obtained from separation or any other process and as defined pursuant to prevailing standards of identity.

Sec. 1301.9 Handler. Handler means:

(a) Any person, except a producer-handler, who operates a pool plant;

(b) Any person who operates a partially regulated plant;

(c) Any person who operates any other plant, or a pool bulk tank unit as defined under the Federal order, from which fluid milk products are disposed of, directly or indirectly, in the regulated area;

(d) Any cooperative association with respect to the milk that is moved from farms in tank trucks operated by, or under contract to, the association to pool plants or as diverted milk to non pool plants for the account of, and at the direction of, the association. The association shall be considered as the handler who received the milk from the dairy farmers. However, the cooperative association

shall not be the handler with respect to the milk moved from any farm if the association and the operator of the pool plant to which milk from such farm is moved both submit a request in writing, on or before the due date for filing the monthly reports of receipts and utilization, that the operator of the pool plant be considered as the handler who received the milk from the dairy farmer, and the pool plant operator's request states that the pool plant operator is purchasing the milk from such farm on the basis of the farm bulk tank measurement readings and the butterfat tests of samples of the milk taken from the farm bulk tank; or

(e) Any person who does not operate a plant but who engages in the business of receiving fluid milk products for resale and distributes to retail or wholesale outlets packaged fluid milk products received from any plant described in paragraph (a), (b) or (c) of this section.

Sec. 1301.10 Producer-handler. Producer-handler means any person who, during the month is both a dairy farmer and a handler and who meets all of the following conditions:

(a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such

milk at the producer-handler's own plant, and to distribute it as route disposition.

(b) The person's own route disposition constitutes the majority of the route disposition from the plant.

(c) The producer-handler receives no fluid milk products except from such handler's own production and from pool handlers, either by transfer or diversion.

Sec. 1301.11 Producer. Producer means:

(a) A dairy farmer who produces milk in the regulated area that is moved to a pool plant or a partially regulated plant, having Class I distribution in the regulated area;

(b) A dairy farmer who produces milk outside of the regulated area that is moved to a pool plant, provided that on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during December 1996 and December 1997, all of that milk was physically moved to a pool plant in the regulated area. Or: to be considered a qualified producer, on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during the current month and for five (5) months subsequent to July of the preceding calendar year, all of that milk must have moved to a pool plant, provided that the

total amount of milk at a pool plant eligible to qualify producers who did not qualify in December 1996 and December 1997 shall not exceed the total bulk receipts of fluid milk products less:

(1) Producer receipts as described in paragraph (a) of this section and producer receipts as described in paragraph (b) of this section who are qualified based on December 1996 and December 1997;
(2) 90% of the total bulk transfers of fluid milk products (not including bulk transfers of skimmed milk and condensed milk) disposed outside of the regulated area; and
(3) 100% of packaged fluid milk products disposed outside of the regulated area.

(c) A dairy farmer who produces milk outside of the regulated area that is moved to a partially regulated plant and allocated to Class I pursuant to Section 1304.5. However, the term shall not include:

(1) A producer handler;

(2) A dairy farmer who is a local or state government that has non- producer status for the month under section Sec. 1301.13(c);

(3) A dairy farmer who is a governmental agency that is operating a plant from which there is route disposition in the regulated area;

(4) Dairy farmer milk received at a pool plant or a partially regulated plant which is rejected and segregated in the handler's normal operations for receiving milk and which receipts are accepted and disposed of by the handler as salvaged product rather than milk.

[62 FR 29639, May 30, 1997, as amended at 62 FR 62825, Nov. 25, 1997]

Sec. 1301.12 Producer milk. Producer milk means milk that the handler has received from producers. The quantity of milk received by a handler from producers shall include any milk of a producer that was not received at any plant but which the handler or an agent of the handler has accepted, measured, sampled, and transferred from the producer's farm tank into a tank truck during the month. Such milk shall be considered as having been received at the pool plant at which other milk from the same farm of that producer is received by the handler during the month, except that in the case of a cooperative association in its capacity as a handler under Sec. 1301.9(d), the milk shall be considered as having been received at a plant in the zone location of the pool plant, or pool

plants within the same zone, to which the greatest aggregate quantity of the milk of the cooperative association in such capacity was moved during the current month or the most recent month.

Sec. 1301.13 Exempt milk. Exempt milk means:

(a) Fluid milk products received at a pool plant in bulk from a non pool plant to be processed and packaged, for which an equivalent quantity of package fluid milk products is returned to the operator of the non pool plant during the same month, if the receipt of bulk fluid milk products and return of packaged fluid milk products occur during an interval in which the facilities of the non pool plant at which the fluid milk products are usually processed and packaged are temporarily unusable because of fire, flood, storm or similar extraordinary circumstances completely beyond the non pool plant operator's control;

(b) Packaged fluid milk products received at a pool plant from a non pool plant in return for an equivalent quantity of bulk fluid milk products moved from a pool plant for processing and packaging during the same month, if the movement of bulk fluid milk products and receipt of package fluid milk products occur during an interval in which the facilities of the pool plant at which the fluid milk products are usually processed

and packaged are temporarily unusable because of fire, flood, storm, or similar extraordinary circumstances completely beyond the pool plant operator's control;

(c) Milk received at a pool plant in bulk from the dairy farmer who produced it, to the extent of the quantity of any packaged fluid milk products returned to the dairy farmer, if: (1) The dairy farmer is a State or local government that is not engaged in the route disposition of any of the returned products, and (2) The dairy farmer has by written notice to the compact commission and the receiving handler, elected non-producer status for a period of not less than 12 months beginning with the month in which the election was made and continuing for each subsequent month until canceled in writing, and the election is in effect for the current month.

(d) All fluid milk product disposed outside of the regulated area.

Sec. 1301.14 Fluid milk product.

(a) Except as provided in paragraph (b) of this section fluid milk product means any milk products in fluid or frozen form containing less than nine percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to:

Milk, skim milk, low fat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, culture, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term fluid milk product shall not include: (1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and (2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

Sec. 1301.15 Fluid cream product. Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing nine percent or more butterfat, with or without the addition of other ingredients.

Sec. 1301.16 Filled milk. Filled milk means any combination of non-milk fat (or oil) with skimmed milk (whether fresh, cultured,

reconstituted, or modified by the addition of nonfat milk solids), with or without milk fat, so that the product (including stabilizers, emulsifiers, or flavoring) resembles milk or any other fluid milk product, and contains less than six percent non-milk fat (or oil).

Sec. 1301.17 Cooperative association. Cooperative association means any cooperative marketing association of producers which the Secretary of Agriculture of the United States determines:

(a) To be qualified under the provisions of the Act of Congress of February 18, 1922, known as the ``Capper-Volstead Act';

(b) To have full authority in the sale of milk of its members; and

(c) To be engaged in making collective sales of, or marketing milk or its products for its members.

Sec. 1301.18 Person. Person means any individual, partnership, corporation, association, or other business unit.

Sec. 1301.19 Route disposition. Route disposition means distribution of Class I milk by a handler to retail or wholesale outlets, which include vending machines but do not include plants or distribution points. The route disposition of a handler shall be attributed to

the processing and packaging plant from which the Class I milk is moved to retail or wholesale outlets without intermediate movement to another processing and packaging plant.

Sec. 1301.20 Distributing plant. Distributing plant means a processing and packaging plant.

Sec. 1301.21 Supply plant. Supply plant means a plant at which facilities are maintained and used for washing and sanitizing cans and to which milk is moved from dairy farmers' farms in cans and is there accepted, weighed or measured, sampled, and cooled, or it is a plant to which milk is moved from dairy farmers' farms in tank trucks.

Sec. 1301.22 State dairy regulation. State dairy regulation means any state regulation of dairy prices, and associated assessments, whether by statute, marketing order or otherwise.

Sec. 1301.23 Diverted milk. Diverted milk means milk, other than that excluded under Sec. 1301.11 from being considered as received from a producer, that meets the conditions set forth in paragraph (a) or (b) of this section and is not excluded from diverted milk under paragraph (c) of this section.

(a) Milk that a handler in its capacity as the operator of a pool plant reports as having been moved from a dairy farmer's farm to the pool plant, but which the handler caused to

be moved from the farm to another plant, if the handler specifically reports such movement to the other plant as a movement of diverted milk, and the conditions of paragraph (a) (1) or (2) of this section have been met. Milk that is diverted milk under this paragraph shall be considered to have been received at the pool plant from which it was diverted.

(1) During any two (2) months subsequent to July of the preceding calendar year, or during the current month, on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during the month, all of the milk that the handler caused to be moved from that farm was physically received as producer milk at the handler's pool plant or at another of the handler's pool plants that is not longer operated as a plant.

(2) During the current month and not more than five (5) other months subsequent to July of the preceding calendar year, milk from the dairy farmer's farm was received at or diverted from the handler's pool plant as producer milk, and during the current month all of the milk from that farm that the handler reported as diverted milk was moved from the farm in a tank truck in which it was

intermingled with milk from other farms, the milk from a majority of which farms was diverted from the same pool plant in accordance with the preceding provisions of this paragraph.

(b) Milk that a cooperative association in its capacity as a handler under Sec. 1301.9 (d) caused to be moved from a dairy farmer's farm to a plant other than a pool plant if the association specifically reports the movement to such plant as a movement of diverted milk, and the conditions of paragraph (b) (1) or (2) or this section have been met. Milk that is diverted under this paragraph shall be considered to have been received by the cooperative association in its capacity as a handler under Sec. 1301.9 (d).

(1) During any two (2) months subsequent to July of the preceding calendar year, or during the current month, on more than half of the days on which the cooperative association in its capacity as a handler under Sec. 1301.9 (d) caused milk to be moved from the farm as producer milk during the month, all of the milk that the association caused to be moved from the farm was physically received at a pool plant.

(2) During the current month and not more than five (5) other months subsequent to July of the preceding

calendar year, the cooperative association in its capacity as a handler under Sec. 1301.9(d) caused milk to be moved from the dairy farmer's farm as producer milk, and during the current month all of the milk from that farm that the cooperative association in its capacity as a handler under Sec. 1301.9(d) reported as diverted milk was moved from the farm in a tank truck in which it was intermingled with milk from other farms, the milk from a majority of which farms was diverted by the association in accordance with the preceding provisions of this paragraph.

(c) Milk moved, as described in paragraphs (a) and (b) of this section, from dairy farmer's farms to partially regulated plants in excess of 35 percent in the months of September through November and 45 percent in other months, of the total quantity of producer milk received (including diversions) by the handler during the month shall not be diverted milk. Such milk, and any other milk reported as diverted milk that fails to meet the requirements set forth in this section, shall be considered as having been moved directly from the dairy farmers' farms to the plant of physical receipt, and if that plant is a nonpool plant the milk shall be excluded from producer milk.

* * *

PART 1305--CLASS PRICE

Sec. 1305.1 Compact over-order class I price and compact over-order obligation. The compact over-order Class I price per hundredweight of milk shall be as follows:

(a) The class I price shall be $16.94 per hundredweight.

(b) The compact over-order obligation shall be computed as follows: (1) The compact Class I price ($16.94); (2) Deduct Federal Order #1 Zone 1, Class I price; (3) The remainder shall be the compact over-order obligation.

[62 FR 62825, Nov. 25, 1997]

* * *

PART 1306--COMPACT OVER-ORDER PRODUCER PRICE

Sec. 1306.1 Handler's value of milk for computing basic over-order producer price. For the purpose of computing the basic over-order producer price, the compact commission shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in Sec. 1301.9 (d) of the chapter with respect to milk that was not received at a pool

plant, as directed in this section. Any pool plant that does not exceed a daily average of 300 quarts of disposition in the compact regulated area in the month shall not be subject to the compact over-order obligation. The total assessment for each handler is to be calculated by multiplying the pounds of Class I fluid milk products as determined pursuant to Sec. 1304.1 (a) by the compact over-order obligation. [62 FR 62826, Nov. 25, 1997]

Sec. 1306.2 Partially regulated plant operator's value of milk for computing basic over-order producer price. For the purpose of computing the basic over-order producer price, the compact commission shall determine for each month the value of milk disposition in the regulated area by the operator of a partially regulated plant as directed in this section. Any partially regulated plant that does not exceed a daily average of 300 quarts of disposition in the compact regulated area in the month shall not be subject to the compact over-order obligation. The total assessment for each handler is to be calculated by multiplying the pounds of Class I fluid milk products as determined pursuant to Sec. 1304.1 (a) of this chapter by the compact over-order obligation. [62 FR 62826, Nov. 25, 1997]

Sec. 1306.3 Computation of basic over-order producer price. The compact commission shall compute the basic over-order producer price per

hundredweight applicable to milk received at plants as follows:

(a) Combine into one total the values computed pursuant to Sec. 1306.1 and Sec. 1306.2 of this chapter for all handlers from whom the compact commission has received at the Compact Commission's office prior to the 9th day after the end of the month the reports for the month prescribed in Sec. 1303.1 and the payments for the preceding month required under Sec. 1307.3 (a) of this chapter.

(b) Subtract 3% of the total value computed pursuant to paragraph (a) above for the purpose of retaining a reserve for WIC pursuant to the Formal Agreement for reimbursement of WIC Program costs entered into between the Commission and the six New England State WIC Program Directors, as approved by the Food and Consumer Service of the United States Department of Agriculture (USDA);

(c) In any month when the average percentage increase in production in the regulated area comes within 0.25 of the average percentage increase in production for the nation, subtract from the total value computed pursuant to paragraph (a) above, for the purpose of retaining a reserve, an amount estimated by the Commission in consultation with the USDA for anticipated costs to reimburse the Commodity Credit Corporation

(CCC) at the end of its fiscal year for any surplus milk purchases. Should those funds not be needed because no surplus purchases were made by the CCC at the end of its fiscal year, it is to be disbursed as follows:

(1) Any producer who has received payment from a handler pursuant to Sec. 1307.4 shall become eligible to receive a pro rata disbursement by submitting to the Commission documentation that the producer did not increase production of milk during and after the month on which the regional rate of production increase met or exceeded the national rate of production increase, as compared to the same period in the preceding year. Such documentation shall be filed with the Commission not later than 45 days after the end of the fiscal year.

(2) The Commission shall calculate the amount of refund to be provided to each eligible producer by taking into account the total amount of retained proceeds, the total production of milk by all producers eligible for refunds, and the total amount of production by each eligible producer.

(d) Add an amount equal to not less than one-half of the unobligated balance of the producer-settlement fund at the close of

business on the 8th day after the end of the month;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations: (1) The total hundredweight of producer milk; (2) The total hundredweight for which a value is computed pursuant to Sec. 1306.2(a); and

(f) Subtract not less than four (4) cents nor more than five (5) cents for the purpose of retaining a cash balance in the producer-settlement fund. The result shall be the basic over-order producer price for the month. [62 FR 62826, Nov. 25, 1997]

* * *

PART 1307--PAYMENTS FOR MILK

Sec. 1307.1 Producer-settlement fund.

(a) The compact commission shall establish and maintain a separate fund known as the producer-settlement fund. It shall deposit into the fund all amounts received from handlers under Sec. 1307.3, Sec. 1307.7, and Sec. 1307.8 of this Chapter and the amount subtracted under Sec. 1306.3(f). It shall pay from the fund all amounts due handlers under Sec. 1307.3, Sec. 1307.7,

and Sec. 1307.8 and the amount added under Sec. 1306.3(d) subject to their right to offset any amounts due from the handler under these sections and under Sec. 1308.1 of this chapter.

(b) All amounts subtracted under Sec. 1306.3(f), including interest earned thereon, shall remain in the producer-settlement fund as an obligated balance until it is withdrawn for the purpose of effectuating Sec. 1306.3(d).

(c) The compact commission shall place all monies subtracted under Sec. 1306.3(b), 1306.3(c), and 1306.3(f) in an interest-bearing bank account or accounts in a bank or banks duly approved as a Federal depository for such monies, or invest them in short-term U.S. Government securities. [62 FR 62826, Nov. 25, 1997]

Sec. 1307.2 Handlers' producer-settlement fund debits and credits. On or before the 15th day after the end of the month, the compact commission shall render a statement to each handler showing the amount of the handler's producer-settlement fund debit or credit, as calculated in this section.

(a) The producer-settlement fund debit for each plant and each cooperative association in its capacity as a handler under Sec. 1301.9 (d) of this chapter shall be the value computed pursuant to Secs. 1306.1 and 1306.2.

(b) The producer-settlement fund credit for each plant and each cooperative association in its capacity as a handler under Sec. 1301.9 (d) shall be computed as specified in this paragraph.

(1) Multiply the quantities of producer milk that were reported by pool plants pursuant to Sec. 1303.1 and the quantities or route disposition in the marketing area by partially regulated plants for which a value was determined pursuant to Sec. 1306.2(a) by the basic over-order producer price computed under Sec. 1306.3.

(2) For any cooperative association in its capacity as a handler under Sec. 1301.9 (d), multiply the quantities of all producer milk reported pursuant to Sec. 1303.1(c) by the basic over-order producer price computed under Sec. 1306.3.

[62 FR 62826, Nov. 25, 1997]

Sec. 1307.3 Payments to and from the producer-settlement fund.

(a) On or before the 18th day after the end of the month, each handler shall pay to the compact commission the handler's producer-

settlement fund debit for the month as determined under Sec. 1307.2(a).

(b) On or before the 20th day after the end of the month, the compact commission shall pay to each handler the handler's producer-settlement fund credit for the month as determined under Sec. 1307.2(b). If the unobligated balance in the producer-settlement fund is insufficient to make such payments, the compact commission shall reduce uniformly such payments and shall complete them as soon as the funds are available.

Sec. 1307.4 Payments to producers.

(a) On or before the 20th day after the end of the month, each handler shall make payment to each producer for the milk received from him during the month at not less than the basic over-order producer price per hundredweight computer [sic] under Sec. 1306.3. If the handler has not received full payment for the compact commission under Sec. 1307.3(b) by the date payments are due under this paragraph, he may reduce pro rata his payments to producers by an amount not to exceed such underpayment. Such payments shall be completed after receipt of the balance due from the compact commission by the next following date for making payments under this paragraph.

(b) If the handler's net payment to a producer is for an amount less than the total amount due the producer under this section, the burden shall rest upon the handler to prove to the compact commission that each deduction from the total amount due is properly authorized and properly chargeable to the producer.

(c) In making payment to producers under paragraph (b) of this section for milk diverted from a pool plant the handler may elect to pay such producers at the price of the plant from which the milk was diverted, if the resulting net payment to each producer is not less than the otherwise required under this section and the rate of payment and the deduction shown on the statement required to be furnished under Sec. 1307.6 are those used in computing the payment.

(d) If a handler claims that the required payment cannot be made because the producer is deceased or cannot be located, such payment shall be made to the producer-settlement fund, and in the event that the handler subsequently locates and pays the producer or a lawful claimant, or in the event that the handler no longer exists and a lawful claim is later established, the compact commission shall make such payment from the producer-settlement fund to the handler or to the lawful claimant, as the case may be.

(e) If not later than the date when such payment is required to be made, legal proceedings have been instituted by the handler for the purpose of administrative or judicial review of the compact commission findings upon verification as provided above such payment shall be made to the producer-settlement fund and shall be held in reserve until such time as the above-mentioned proceedings have been completed or until the handler submits proof to the compact commission that the required payment has been made to the producer in which latter event the payment shall be refunded to the handler.

(f) At a partially regulated plant each handler shall make payments, on a pro rata basis, to all producers and dairy farmers for milk (excluding diverted pool producer milk) received from them during the month, the payment received pursuant to Sec. 1307.3(b).

[62 FR 29645, May 30, 1997, as amended at 62 FR 62827, Nov. 25, 1997] .

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No. 99-1437 and No. 99-1438

In the Supreme Court of the United States

OCTOBER TERM, 1999

CUMBERLAND FARMS, INC., ET AL.,
Petitioners,

v.

NORTHEAST DAIRY COMPACT COMMISSION, ET AL.,
Respondents.

NEW YORK STATE DAIRY FOODS, INC., ET AL.,
Petitioners,

v.

NORTHEAST DAIRY COMPACT COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PARTIES TO THE PROCEEDING

Petitioners have failed properly to apprise this Court of the parties to the proceeding. First, petitioners incorrectly name Daniel Smith as a respondent. As petitioners know, on May 27, 1998, the district court granted the Commission's unopposed motion pursuant to Fed. R. Civ. P. 25(d) to substitute Kenneth M. Becker for Daniel Smith as the proper party-defendant in this matter because Mr. Becker had succeeded Mr. Smith as the Commission's Executive Director. *See* Pet. No. 99-1437 at App. 3 (referring to Mr. Becker). Second, petitioners neglect to inform the Court that Farmland Dairies was also an appellant in the proceeding below, but opted not to seek certiorari review.

Petitioners' filings also violate Rule 12.4, which provides that parties "may petition separately for a writ of certiorari; *or* any two or more may join in a petition" (emphasis added). Petitioners New York State Dairy Foods, Inc. ("NYSDF") and Elmhurst Dairy ("Elmhurst") improperly opted to do both. They "join[ed]" the petition filed on behalf of NYSDF, Elmhurst, Cumberland Farms, Inc. ("Cumberland"), and Crowley Foods, Inc. ("Crowley"), *see* Pet. No. 99-1437 at ii, and also filed their own separate Pet. No. 99-1438. For the convenience of the Court, this Opposition responds to both the filing on behalf of all petitioners (Pet. No. 99-1437), and the unauthorized second petition of NYSDF and Elmhurst (Pet. No. 99-1438).[1]

---

[1] Petitioners also appear to have violated this Court's rules regarding appearance of counsel. The counsel of record in No. 99-1437 apparently is counsel only for Petitioner Cumberland Farms. *See* Pet. 30 ("Attorneys for Petitioner"); Cumberland Farms' Waiver of Right to File a Response in No. 99-

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INTRODUCTION

Petitioners' efforts to invoke this Court's certiorari jurisdiction consist of a scattershot series of case-specific challenges to the application of settled rules of law, many of which were not properly raised and preserved in the course of the extensive administrative and judicial proceedings below. Indeed, petitioners appear to have abandoned the erroneous argument that they principally urged on administrative and district court review -- *i.e.*, that the Northeast Dairy Compact Commission lacks all authority to regulate milk that is distributed within the Compact region, but that originates outside that region. On appeal, petitioners appeared to focus on a fundamentally different challenge to the Compact -- its allegedly unlawful failure to mandate identical treatment for milk processors located inside and outside the Compact region -- notwithstanding that the district court had expressly found this claim to have been "inadequately briefed or explained." Appendix to Cumberland Petition ("Pet. App.") at 75, n.11. While this and other procedural defects provide a more than adequate basis for rejecting the present petitions, they are not the only such basis. Rather, as set forth below, petitioners simply fall far short of demonstrating that any of their "questions presented" comes close to satisfying this Court's standards for the exercise of its certiorari review.

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1438 (indicating that the counsel of record in No. 99-1437 represents only Cumberland). Thus, the other three "petitioners" have no counsel listed in No. 99-1437. Indeed, "Petitioner" Crowley has no counsel listed on *either* No. 99-1437 *or* No. 99-1438. *But see* S. Ct. Rule 34.1(g) ("Each document shall bear on its cover . . . the name of the attorney who is counsel of record for the party concerned . . . ").

STATEMENT OF THE CASE

The Northeast Interstate Dairy Compact ("Compact") is an interstate agreement among the states of Maine, Vermont, Connecticut, Massachusetts, New Hampshire, and Rhode Island. Pet. App. at 4. Overwhelmingly supported by these six diverse states and approved by Congress, *Id.* at 4, 10, the Compact addresses the New England dairy farming crisis -- a crisis that threatens not only the livelihoods of dairy farmers themselves, but also the Compact region's broader economy and environment. *Id.* at 154-55. The Northeast Dairy Compact Commission ("Commission") is the six-state governmental agency authorized to implement the Compact. *Id.* at 4.

1. ***The Compact*** -- Individual state efforts to respond to New England's severe dairy farming crisis have proved unworkable. Among other difficulties, in light of the pervasively interstate nature of dairy farming and distribution in the New England region, a number of such efforts were invalidated on Commerce Clause grounds. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). Under the Compact Clause (Art. I, §10, cl.3), however, states may enter into interstate agreements with the approval of Congress and regulate on an interstate basis; congressional approval of an interstate compact removes compact activities from dormant Commerce Clause challenge, and transforms the states' agreement into federal law. *See, e.g., Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985) ("Here the commerce power of Congress is not dormant, but has been exercised by that body . . . . When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.").

Between 1989 and 1993, the legislatures of the six Compact states overwhelmingly approved the Compact after an extensive democratic process. *Milk Industry Foundation v. Glickman*, 132 F.3d 1467, 1471 (D.C. Cir. 1998). In 1996, Congress explicitly "consent[ed]" to the Northeast Interstate Dairy Compact in Section 147 of the Farm Bill (7 U.S.C. § 7256 (1996)). As is common, Congress also adopted certain conditions in consenting to the Compact. 7 U.S.C. § 7256(1)-(7).[2]

The Compact authorizes the Commission to regulate milk distributed in the Compact region by adopting regulations establishing the minimum price that farmers shall receive from processors (or "handlers") for that milk. Compact §§ 4, 8-10. Handlers subject to regulation under the Compact include "pool plants" and "partially regulated plants." *Id.* §§ 9(d), 2(7). "Pool plants" are milk processing plants located in the region. *Id.* § 2(6). "Partially regulated plants" are plants located outside the region that *either* (1) distribute milk in the region, *or* (2) purchase milk from farmers in the region. *Id.* § 2(7).

Each Compact state has a single vote in the Commission's affairs. Compact § 4. No price regulation may be adopted without a two-thirds vote of all states; and no state is subject to a regulation it has not voted to adopt.

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[2] Petitioners inaccurately state that Senate Joint Resolution 28, 104th Cong. (1995), reproduced at Appendix E of the Cumberland Petition (Pet. App. 149-87), "set[s] forth the text of the Northeast Interstate Dairy Compact." Cumberland Pet. at 3. In fact, however, Congress consented only to "section 1(b) [of] Senate Joint Resolution 28." 7 U.S.C. 7256. Section 1(a), which is also included in petitioners' Appendix E (Pet. App. 151-54), was not approved by Congress and is not a part of the Compact. Congressional legislation has now extended the Compact through September 30, 2001. *See* 7 U.S.C. § 7256(3) (*as amended by* Pub. L. No. 106-113, § 4 (1999)).

Id. §§ 4, 5. Each state must appoint a carefully constituted delegation to the Commission, comprising three to five members and including at least one consumer representative and one dairy farmer. *Id.* § 4. The Compact also specifies an administrative procedure to address milk handler objections. *Id.* § 16(b). Patterned after a parallel federal provision, the Compact requires exhaustion of administrative remedies and provides for judicial review of the Commission's final administrative decision. *Id.* § 16(b)-(c); 7 U.S.C. § 608c(15).

2. ***The Commission's Regulation*** – In May 1997, the Commission exercised its notice-and-comment rulemaking authority under the Compact to adopt a price regulation, effective July 1, 1997. 62 Fed. Reg. 29,626 (codified at 7 C.F.R. pt. 1300). This regulation supplements an extensive federal system for regulating milk prices established pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, under which the Secretary of Agriculture's "milk marketing orders" set the minimum price that farmers receive from processors. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 341-42 (1984). In this federal system, handlers make payments for milk they purchase from farmers into a "pool," and the pool administrator pays money from that "pool" back to the handlers for distribution to farmers.

The Commission's regulation, adopted by a 6-0 vote of the Compact states, supplements the federal system by establishing an "over-order" price that similarly requires processor payments into a "pool," from which payments are made back to processors for distribution to producers. Specifically, the regulation provides that the minimum price paid by handlers for "Class I" (fluid) milk will be $16.94 per hundredweight (*i.e.*, one hundred pounds of milk). 7 C.F.R.

§ 1305.1. Thus, if the federal price were $15.94 per hundredweight for a given month, the handler's "over-order" obligation to be paid into the Compact pool for that period would be $1.00 per hundredweight; if, however, the federal price were $16.94 per hundredweight or higher, there would be no over-order obligation for that month.

The Commission's price regulation provides for regulation of both pool plants and partially regulated plants. 7 C.F.R. § 1301.9(a)-(b). The regulation makes no distinctions based on the location of the farmer in terms of farmer benefits from the regulation. A farmer in New York (outside the region) that supplies a pool plant is treated exactly like a farmer in Vermont (in the region) supplying a pool plant. Similarly, a farmer in New York supplying a partially regulated plant is treated exactly like a farmer in Vermont supplying a partially regulated plant. *Id.* § 1307.4.

Pool plants and partially regulated plants are, however, treated somewhat differently -- based on differences in the two types of plants and their relationship to the region's milk supply -- in calculating disbursements from the pool. Disbursements to pool plants are based on the plants' total "producer milk," while disbursements to partially regulated plants are based on the plants' Class I milk distribution in the Compact region. *Id.* § 1307.2(b)(1). Thus, payments to processors located outside of the Compact region are based on their nexus to the region, *i.e.*, the milk they distribute in-region.[3]

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[3] Petitioners' claim that this differential treatment of pool and partially regulated plants is "discriminatory," *see, e.g.*, NYSDF Pet. at 8, and the hypothetical that petitioners presented to the district court, *see id.*, are both highly misleading. As the Commission explained in detail before the First Circuit, petitioners' hypothetical is entirely counter-factual, and the purportedly

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3. ***Petitioners' Challenge*** **–** Petitioners Cumberland Farms, Crowley Foods, and Elmhurst Dairy are milk processors that operate plants in New York, and that purchase milk from farms located outside of the Compact region for distribution in-region. Petitioner New York State Dairy Foods, Inc., is a trade association representing New York handlers. The processor petitioners are thus "partially regulated" plants under the Commission's regulations.

(A) ***Request for Injunctive Relief*** **–** In July 1997, petitioners and other co-plaintiffs sought emergency injunctive relief to block any Compact payments to New York farmers for milk distributed in the Compact region. The district court denied the injunction.

(B) ***Petitioners' Administrative Challenges*** **–** At petitioners' request, the Commission agreed to afford expedited administrative review of their claims. Petitioners Crowley and Cumberland filed one consolidated administrative action; petitioner Elmhurst subsequently filed a second administrative action.

(...Continued)

"equal" treatment advocated by petitioners would lead to bizarre and perverse results. *See* Brief of Appellees Northeast Dairy Compact Commission and Kenneth M. Becker ("Commission's Brief on Appeal") at 50-54. The Commission's differential treatment of pool plants (which distribute over 90% of their milk in-region) and partially regulated plants (which distribute over 90% of their milk outside the Compact region, and which supply only about 2% of the region's milk) is sound and well-justified. *Id.* Contrary to petitioners' claims of "discrimination" against out-of-region interests, moreover, the Attorneys General of New York and New Jersey and the New York Farm Bureau -- an organization that protects the interests of New York farmers -- all participated as *amici* below defending the Commission's actions. Moreover, as the Court of Appeals emphasized, petitions failed properly to preserve an equal protection challenge to this purported "discrimination" in favor of pool plants. Pet. App. 24 n.9

Under Commission procedures, an administrative challenge has two steps: (1) consideration by a Hearing Panel of one-to-three individuals; and (2) consideration by the full Commission. 7 C.F.R. § 1381.4(a), (h). The Commission appointed Hearing Panels consisting of three Commissioners who were consumer representatives from the Commissioners' states. Pet. App. 35. The Panels included no dairy farmers or processors. *Id.* After considering petitioners' written submissions, providing petitioners the opportunity to request an oral hearing and present witnesses (which petitioners declined to do), and permitting petitioners to comment on their Proposed Decisions, the Hearing Panels ruled against petitioners in two "Final Proposed Decisions." *Id.* at 12-13.

The full Commission unanimously adopted the Hearing Panel's Final Proposed Decisions. *Crowley Foods, et al.*, HEP-97-001, 002, 004, 005 (Sept. 25, 1997) ("*Crowley*"), Pet. App. 82-145; *Elmhurst Dairy, et al.*, HEP-97-007, 008 (Dec. 3, 1997) ("*Elmhurst*").[4] Regarding the primary argument that petitioners pursued at that time -- that the Commission lacks all authority to regulate milk distributed in the Compact region that originates outside the region -- the Commission explained in detail that petitioners' claim to regulatory immunity would violate the language, structure and purpose of the Compact. Pet. App. 99-104. The Commission also rejected petitioners' claim that the congressional consent legislation mandated regulatory immunity for petitioners. The Commission wrote that, while

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[4] The *Elmhurst* Decision -- which petitioners failed to include in their petition -- concluded that the *Crowley* analysis "controls here, and is adopted and is incorporated by reference." *See Elmhurst* at 7. Accordingly, we refer to *Crowley*.

Congress's Condition Seven (7 U.S.C. § 7256(7)) denies the Commission authority to impose "compensatory payments" (in which payment obligations imposed on milk from outside the region are used solely to "compensate" in-region producers and are *not* shared with the out-of-region producers providing the milk), the congressional legislation and Compact explicitly retain the Commission's "pooling" authority (in which milk distributed in the region is pooled, with payments from the pool going to all producers who provided the milk, regardless of their location or the location of the handler). Pet. App. 111-17.

The Commission also rejected petitioners' Due Process challenge. The Commission found that including dairy farmers as part of an overall state delegation in the rulemaking process does not violate due process; rather, the general practice of including industry representatives on rulemaking bodies is well-settled and constitutional. Pet. App. 133-35. Similarly, the Commission concluded that the participation in the hearing process of Commission members who had participated in the rulemaking was not unconstitutional. *Id.* at 136-37.

(C) ***Judicial Review*** -- Petitioners sought review of the Commission's decision in district court. On November 2, 1998, the district court denied petitioners' summary judgment motion and granted the Commission's summary judgment motion. Pet. App. 38-81.

The court rejected petitioners' primary challenge that the Commission lacks all authority to regulate milk that is distributed in the Compact region, but that originates outside the region. Like the Commission, the court concluded that §§ 2(7), 9(d), and 10(7) of the Compact expressly authorize the Commission to adopt provisions "specially governing"

the "pricing and pooling" of milk handled by partially regulated plants -- plants which, by definition, are located outside the region but distribute fluid milk in-region (§ 2(7)). Pet. App. 68-69. The court also joined the Commission in rejecting petitioners' argument that, even if the Compact itself gives the Commission authority over in-region milk originating from outside the region, the congressional consent legislation invalidates that authority. *Id.* at 70-73. In response to petitioners' new contention that the Commission's regulations violated the Commerce Clause because they did not sufficiently *include* partially regulated plants -- that is, because the regulation does not provide for identical payments to pool plants and partially regulated plaints -- the court found that petitioners' claim had been "inadequately briefed or explained," and therefore had not been preserved. *Id.* at 74-75 n.11.[5]

Finally, regarding petitioners' Due Process challenges to the Commission's composition, the district court recognized that "[i]ndividuals from a particular industry typically serve on administrative bodies with regulatory authority over that industry." Pet. App. 77. The court noted that the Compact mandates the inclusion, within each state delegation, of at least one "consumer representative," *Id.* at 79, and held that the judgment of six sovereign states and Congress that "dairy farmer expertise" should be included "within each state delegation" was permissible, in light of the overall "constituency of the state delegations." *Id.* at 79-80.

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[5] At the summary judgment hearing, the district court repeatedly warned petitioners that their new claim of differential treatment had not been adequately raised. *See* Commission's Brief on Appeal at 47 & n.20. Although petitioners' motion was pending for seven months after the hearing, petitioners never submitted supplemental briefing, or any further explanation to address the district court's concerns. *Id.*

On appeal to the First Circuit, petitioners recast the essence of their challenge to the Compact. Petitioners emphasized the argument that the Commission's regulation purportedly violates the dormant Commerce Clause because it does not treat partially regulated plants exactly the same as pool plants -- the very claim that, as noted above, the district court had held to be "inadequately briefed or explained," and therefore not preserved. At the same time, petitioners continued to urge that the Commission lacks all authority to regulate handlers who distribute out-of-region milk within the Compact region, and also renewed their Due Process arguments.

In a careful and detailed decision, the First Circuit unanimously agreed with the lower court and the Commission that all of petitioners' arguments lacked merit. Pet. App. 1-37. The court found that the starting point for analyzing petitioners' Commerce Clause claims "is whether Congress consented to the actions of the Commission." Such consent, the court wrote, "must be either 'expressly stated,' [*Sporhase v. Nebreska ex rel. Douglas*, 458 U.S. 941, 960 (1982)], or "made unmistakably clear," [*South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)]." Pet. App. 18-19.

The court first rejected petitioners' argument that "the Compact . . . allows the Commission to regulate only those handlers who receive milk produced within the Compact region." Pet. App. 20. The court found that, to the contrary, the Compact "specifically authorizes the Commission to regulate the 'pricing and pooling of milk handled by partially regulated plants.'" *Id.* (quoting Compact §§ 10(7), 2(7), 9(d)). The court also agreed with the district court that this plain language reflected the Compact's purpose; indeed, failing to authorize regulation of partially regulated plants

distributing milk from outside the Compact area in-region "would leave a gaping hole in the regulatory regime." Pet. App. 21.

The First Circuit also considered and rejected petitioners' claim that the Commission's regulations violate the congressional consent legislation. The court found that while the two kinds of plants "are not treated with absolute similitude," Congress's authorization of differential treatment (via the pooling mechanism) was clear: "Congress distinguished between compensatory payments under § 10(6), which Congress barred, and 'pricing and pooling of milk' under § 10(7), which Congress allowed." Pet. App. 23-25. Congress's consent to the Commission's regulation was thus "made unmistakably clear." *Id.* at 26-27.

Finally, the First Circuit also joined the Commission and the district court in rejecting petitioners' due process challenges. As to the Commission's rulemaking process, the Court found that petitioners' claim lacked merit regardless of the level of due process scrutiny afforded. Pet. App. 30-33. Regarding the Commission's hearing process, the court found that petitioners had not properly preserved their claim because they had failed to "mov[e] to disqualify all handlers and farmers from the Commission decision on their petitions." *Id.* at 36-37. Moreover, the court held, petitioners' challenge to the administrative hearing process also failed on the merits. *Id.* at 33-37.

REASONS FOR DENYING THE WRIT

I. The Standard For Determining Whether Congress Has Given Consent Under The Commerce Clause Is Well-Established And Was Properly Applied By The First Circuit.

Petitioners' primary argument in favor of certiorari review is that the Court of Appeals' decision raises an "important question of federal law" relating to the requirements for effective congressional consent in the Compact Clause and Commerce Clause contexts. *See* Cumberland Pet. at 13-20; NYSDF Pet. at 10-13. Specifically, petitioners suggest that the lower court was confused about these requirements, and erroneously substituted the lenient standard for congressional consent under the Compact Clause for the more demanding standard applicable to determining whether Congress consented to what might otherwise be a Commerce Clause violation. *See* Cumberland Pet. at 13 (asserting that the "decision of the Court of Appeals rests on the premise that conditional congressional consent (under the Compact Clause) . . . is adequate consent (under the Commerce Clause) . . . ."); NYSDF Pet. at 10 (characterizing the Court of Appeals' decision as "uphold[ing] trade barriers between Compact states and non-participating states, without finding unambiguous clarity in congressional consent as required for Commerce Clause purposes"). This argument, however, is both misleading and wrong.

Most importantly, petitioners' claim relies on a fundamental mischaracterization of the lower court opinion. Far from applying a lenient standard to the question "whether Congress consented to the actions of the

Commission," the lower court actually explained in detail that the "standard for finding congressional consent [in the Commerce Clause context] is high." Pet. App. 18-19. The court wrote:

> Such consent must be either "expressly stated," [*Sporhase*, 458 U.S. at 960], or "made unmistakably clear," [*South-Central*, 467 U.S. at 91]. . . . The statute or legislative history relied on as consent must "evince[] a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause." [*New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982)]. The burden of showing consent lies with the Commission. *See* [*Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992)].

Pet. App. 18-19. Indeed, not only did the lower court properly set forth the well-established standard for finding congressional consent in the Commerce Clause context, but it did so by citing *exactly the same decisions of this Court* upon which petitioners rely in arguing that the lower court applied an improper standard. *See, e.g.*, Cumberland Pet. at 21-22 ("Congress's consent [in the Commerce Clause context] must be expressly stated or unmistakably clear and unambiguous . . . .") (citing *Sporhase*, *South-Central*, *Wyoming*, and *New England Power*); NYSDF Pet. at 11 ("Congress's consent must be expressly stated or unmistakably clear and unambiguous . . . [under the] Commerce Clause.") (citing *Sporhase*, *South-Central*, and *Wyoming*). Accordingly, the confusion alleged by petitioners concerning the standard applicable to weighing

congressional consent in Commerce Clause context simply does not exist, and cannot justify the exercise of this Court's certiorari review.

Perhaps cognizant of the weakness of their contrived "important question of federal law," petitioners also argue that the First Circuit's decision "conflicts with relevant decisions of this Court." Cumberland Pet. at 20. The only "conflict" alleged, however, is that the court of appeals found consent where it purportedly does not exist "[u]nder the relevant decisions of this Court." *Id.* at 29. This portion of petitioners' argument is thus merely a case-specific challenge to the application of the settled standard for consent -- set forth in detail by the Court of Appeals -- to the particular circumstances of this case. Such a challenge does not warrant the exercise of this Court's review.

That is particularly true here because, contrary to petitioners' arguments, the lower court's application of the well-settled standard for consent was entirely correct. As the Commission, the district court, and the First Circuit have now unanimously found, "[t]here can be no dispute in this case that Congress expressly consented to the Compact," Pet. App. 18, and "the Compact specifically authorizes the Commission to regulate the 'pricing and pooling of milk handled by partially regulated plants.'" *Id.* at 20 (quoting Compact § 10(7)). "The Compact further provides that '[t]he Commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area." Pet. App. 20 (quoting Compact § 9(d)). Thus, on its face, the Compact expressly and unambiguously authorizes the pricing and pooling of milk brought into the region by partially regulated plants.

Petitioners contended below that this express consent was somehow undercut by Congress's admonition that "[t]he Compact Commission shall not use compensatory payments . . . as a barrier to the entry of milk into the Compact region or for any other purpose." 7 U.S.C. § 7256(7) (1996). As the Commission, the district court, and the unanimous Court of Appeals all agreed, however, there is a simple, yet critical, difference between a "compensatory payment" and the pooling method at issue in this case. "[U]nder a compensatory payment system, the partially regulated plants would receive no disbursements whatsoever from the pool," thus "forc[ing] handlers outside the pool to pay what amounts to a tariff upon entry into the regulated area." Pet. App. 22-23. In contrast, the "pool payment mechanism," "by allowing for payments back to the out-of-compact producers . . . could be said to encourage the entry of [out-of-region] milk." *Id.* at 23. Thus, petitioners' contention that Congress's express consent to the Commission's regulations should be discounted on the basis of the ban on "compensatory payments" was properly rejected by the Commission and the lower courts.[6]

In sum, petitioners' argument that the opinion below requires review by this Court due to an alleged confusion surrounding the standards for congressional consent in the Commerce Clause context is based on a misrepresentation of the lower court's opinion. In fact, the Court of Appeals set forth precisely the standard that petitioners urge, and found it

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[6] For this reason, petitioners' reliance on Congress's condition that the "Commission shall not prohibit or in any way limit the marketing in the compact region of any milk . . . produced in any other production area" is also misplaced. *See, e.g.*, Cumberland Pet. at 24. Again, as the First Circuit found, by providing for pool payments to out-of-region processors, the Compact actually encourages the in-region marketing of out-of-region milk. Pet. App. 23.

to be satisfied. Petitioners' case-specific challenge to that finding cannot justify certiorari review, particularly given that the challenged holding was clearly correct.

II. The Circuit Court Conflict Alleged By Petitioners Does Not Exist.

In addition to the argument discussed above, Petitioners NYSDF and Elmhurst urge -- through the unauthorized filing of their *second* Petition for Certiorari in connection with the First Circuit's decision, *see* NYSDF Pet. at 13-16 -- that this Court should grant certiorari review because there is purportedly a "conflict between the circuits" arising from the decision below and the Third Circuit's opinion in *Sani-Dairy v. Espy*, 939 F. Supp. 410 (W.D. Pa. 1993), *aff'd Sani-Dairy v. Yeutter*, 91 F.3d 15 (3rd Cir. 1996). The "conflict" alleged by petitioners simply does not exist.

First, the Court of Appeals' decision in this case did not disagree with *Sani-Dairy* as a legal matter, but rather found the circumstances presented by that case distinguishable. Specifically, the lower court explained that the critical factual difference between this case and the "compensatory payment" cases cited by petitioner is that "under a compensatory payment system, the partially regulated plants would receive no disbursements whatsoever from the pool," Pet. App. 22, while the Commission's pool mechanism "allow[s] for payments back to the out-of-compact producers" and thereby "encourage[s] the entry of [out-of-region] milk." *Id.* at 23. Because this "crucial factor," *id.* at 22, distinguishes *Sani-Dairy* from the present case, the cases cannot constitute a "split" worthy of this Court's review.[7]

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[7] *See also* Pet. App. 72 n.10 (district court's explanation that compensatory (Continued...)

Moreover, the legal question decided by the district court (and affirmed by the Third Circuit in a one-page *per curiam* opinion) in *Sani-Dairy* had nothing to do with the issues presented by this case. The district court's opinion in *Sani-Dairy* expressly stated that "the issue in this case is whether the [Secretary of Agriculture's] Order 2 regulatory scheme act[ed] to 'prohibit' or 'limit' the marketing of nonpool milk in the Order 2 marketing area [New York/New Jersey] in violation of 7 U.S.C. § 608c(5)(G)." 939 F. Supp. at 413. Following this Court's decision in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76 (1962), the district court observed that the statutory term "prohibit" should be interpreted to include economic trade barriers as well as physical restrictions. *Sani-Dairy*, 939 F. Supp. at 413. The Court then found that the "effect of the Secretary's regulations is not distinguishable from those struck down in *Lehigh Valley*," 939 F. Supp. at 415, and ruled in favor of plaintiffs. The Third Circuit adopted the district court's reasoning. *Sani-Dairy v. Yeutter*, 91 F.3d 15 (1996).

Clearly, however, the fact that the Third Circuit has held that a particular federal regulatory scheme establishes an economic trade barrier inconsistent with 7 U.S.C. § 608c(5)(G) does not raise a "conflict" with the First Circuit's holding in this case that the pool payments imposed by the Commission's regulations under the Compact are not "compensatory payments" within the meaning of Condition 7 of the congressional consent to the Compact. The cases

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(...Continued)

payment cases cited by petitioners are distinguishable). Petitioners simply ignore this distinction, which has been noted by the First Circuit, the district court, and the Commission, and which petitioners have not refuted.

simply do not address the same issue. For this reason as well, the "split" alleged by petitioners does not exist, and thus cannot justify the exercise of this Court's certiorari review.[8]

III. The Standards For Determining Whether Agency Action Violates Due Process Are Well-Established, And The Decades-Old State Cases Cited By Petitioners Do Not Require This Court's Review Of That Issue.

Although the precise contours of their claim are not clear from their petition, New York State Dairy Foods and Elmhurst Dairy also apparently challenge, on due process grounds, the composition of the Commission both during its rulemaking process and during the administrative proceedings in this case. NYSDF Pet. at 16-19. Petitioners argue that this Court should grant certiorari review to provide "guidance" on the due process standards applicable to this claim. *Id.* at 19. In fact, however, neither aspect of this challenge merits review by this Court. The challenge to the administrative proceeding, moreover, clearly is procedurally defaulted.

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[8] The legislation approving the Northeast Interstate Dairy Compact is, of course, the only congressional legislation authorizing an interstate dairy compact; no decisions have been issued by any court -- and certainly none by a Court of Appeals -- disagreeing with the First Circuit's decision in this case.

A. Petitioners' challenge to the rulemaking process

Petitioners suggest that the Commission's rulemaking process should be evaluated under the due process standard applicable to adjudications, rather than the standard applicable to rulemaking, because a special principle purportedly applies to "ratemaking." *See* NYSDF Pet. at 16-17, 19 (citing *Railroad Comm'n v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 393-94 (1938)). Petitioners also maintain that the "high courts of several states are in conflict" as to the applicable standard. *Id.* at 16-18. Contrary to petitioners' arguments, however, the standards for determining whether industry representation on a regulatory board violates due process are well-established, and were properly articulated by the Court of Appeals.[9]

The standard for the administrative exercise of adjudicative functions -- as correctly set forth by the lower court -- is whether "an adjudicator has a direct, personal, and substantial pecuniary interest in the outcome of the case." Pet. App. 30 (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). "Participation of adjudicators who 'might conceivably have had a slight pecuniary interest,' however, does not offend due process." Pet. App. 30-31. (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)). As to legislative functions, "[t]he Due Process Clause sets a significantly lower bar. . . ." Pet. App. 31, because "the determination of legislative facts does not . . . implicate the same considerations as does the determination of adjudicative facts." *Id.* (quoting *Concerned Citizens of*

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[9] During the rulemaking itself, petitioners never requested recusal by any Commission member. *See* Commission's Brief on Appeal at 58 n.31.

Southern Ohio, Inc. v. Pine Creek Conservancy Dist., 429 U.S. 651, 657 (1977) (Rehnquist, J., dissenting)); *see also Friedman v. Rogers*, 440 U.S. 1, 17-19 (1979) (emphasizing difference in standard applicable to rulemaking functions and adjudicative functions).

Having thus set forth the two well-settled, potentially applicable standards, the First Circuit proceeded to find that the Commission's composition was constitutional *regardless* of which standard applies. First, treating the Commission's promulgation of regulations as an essentially legislative function, the court found that "[i]ndustry representation on regulatory boards [exercising such functions] is a common and accepted practice," fully consistent with this Court's leading case of *Friedman v. Rogers*, *supra*. Pet. App. 31-32. In addition, however, the court found that "we are not convinced that, given the significant attenuation of the commissioners' potential financial gain, their interest [even] rises to the level of substantiality required by the [adjudicative standard of] *Tumey* and its progeny." *Id.* at 32-33. Thus, not only are the due process standards for both legislative and adjudicative administrative actions well-established, but the First Circuit expressly found that -- on the specific facts of this case -- petitioners' constitutional rights were not violated even under the more stringent "adjudicative" standard that they urged the court to apply.[10]

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[10] Of course, as the Commission argued below, there can be no question that its regulation should be evaluated under the standard applicable to legislative functions. Indeed, because the challenged regulation involves broad policy issues and applies across-the-board to the regulated community on a prospective, going-forward basis, it is a quintessential example of agency exercise of legislative functions. *See, e.g., New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 371 (1989) ("[R]atemaking is an essentially legislative act."); *Minnesota Rate Cases*, 230 U.S. 352, 433 (1913) ("The rate-making

(Continued...)

Moreover, petitioners' suggestion that a number of decades-old state court cases constitute a split on this issue meriting this Court's review is simply incorrect. In fact, those cases are reconcilable both with each other, and with the decision below. *New Hampshire Milk Dealers' Ass'n v. New Hampshire Milk Control Board*, 222 A.2d 194, 197 (N.H. 1966) -- which petitioners suggest is inconsistent with the decision below -- actually *rejected* the claim that the participation of a Board member who had allegedly "prejudged the issue for which he called a public hearing . . . and failed to disqualify himself from participation in the hearing" violated due process. Similarly, *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, 534 N.W.2d 309, 335 (Neb. 1995), *rejected* Chrysler's challenge to the participation of car dealer-franchisees on the Nebraska Motor Vehicle Industry Licensing Board, while *Board of Supervisors v. State Milk Commission*, 60 S.E.2d 35, 38 (Va. 1950), expressly declined to "apply the same qualifications to members of an administrative agency created by the legislature as is required of judges in trying cases." *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 254 P.2d 29 (Cal. 1953), for its part, was not primarily a due process case at all. Rather, it relied on the non-delegation doctrine in striking down a statutory provision authorizing the Board to establish minimum prices for dry-cleaning; the fact that the statute "assume[d] to confer legislative authority

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(...Continued)

power is a legislative power and necessarily implies a range of legislative discretion.") The present circumstances are thus thoroughly distinguishable from *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388 (1938), cited by petitioners, which involved a hearing on the narrow question whether the particular rates charged by the respondent were "just and reasonable." *Id.* at 391-92.

upon those who are directly interested in the operation of the regulatory rule and its penal provisions" only exacerbated the non-delegation problem. *Id.* at 448.

The only other case cited by petitioners is the Michigan Supreme Court's sixty-year-old decision in *Johnson v. Michigan Milk Marketing Board*, 295 N.W. 346 (Mich. 1940). That case involved a provision of the Michigan Milk Marketing Act creating a Milk Marketing Board to establish minimum prices to be paid producers by distributors. According to the majority, although this function was "legislative in nature," the act violated due process by "requir[ing] the appointment of a board, a majority of whose members have a direct pecuniary interest in the matters submitted to them." *Id.* at 351. Notably, however, the regulatory scheme addressed in *Johnson* entirely lacked the distinctive structural safeguards built into the Compact, including the delegation-based voting that the First Circuit held renders the ability of particular interest groups within the Commission to "influence their peers significantly more remote tha[n] it would be in a scheme in which each commissioner voted individually." Pet. App. 36. Accordingly, *Johnson* is critically different from the present case on its facts.

In sum, with regard to the Commission's rulemaking process, the confusion regarding applicable standards that petitioners allege simply does not exist. Those standards were properly set forth and applied by the Court of Appeals.

B. Petitioners' challenge to the hearing process

Before the Court of Appeals, petitioners also argued that the participation of dairy farmers at the second stage of administrative review (*i.e.*, review by the full Commission) in this case violated due process. The First Circuit found, however, that petitioners had failed to preserve this claim because they "could have moved to disqualify all handlers and farmers from the Commission decision on their petitions," but "[t]hey did not do so." Pet. App. 36-37. To the extent that petitioners continue to pursue this argument before this Court, it is clearly procedurally defaulted and should not be considered.

In addition, the Court of Appeals correctly rejected this claim on the merits. Pet. App. 33-36. The court gave three reasons for its conclusion. First, "any potential financial interest on the part of individual [hearing] panel members is highly attenuated," and "too remote to have a constitutionally deficient effect." *Id.* at 33-34. Second, "the Commission's own regulations provide a due process safeguard" by requiring hearing panel members who "have no pecuniary interest in the outcome, and who are otherwise fair and impartial." *Id.* at 34-35. Third, on review by the full Commission, "the Commission members vote as state delegations, not individual members," which renders the possibility of improper influence by individual members "significantly more remote than it would be in a scheme in which each commissioner voted individually." *Id.* at 35-36. Thus, as the Court of Appeals found, petitioners' challenge to the hearing process would fail even were it not procedurally barred.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

New York State Dairy Foods, *et al.*,
Petitioners

v.

Northeast Dairy Compact Commission, *et al.*
Respondents

On Petition For Writ of Certiorari
To the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Northeast Dairy Compact Commission's practice of imposing a mandatory charge upon processors located outside the Compact region, without regard to whether such charge renders their total product cost higher than the total product cost for in-region processors, violates Congress' limiting conditions: (1) that the Compact Commission abide by procedures established in the federal milk marketing program for inter-market sales of milk; (2) that the Commission not impose trade barriers to the disadvantage of producers and processors located outside the Compact region; and (3) that the Commission not impose compensatory payments as defined by this Court's decision in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76 (1962)?

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INTERESTS OF THE AMICI CURIAE[1]

The Amici are: (1) dairy farmer cooperatives and associations representing dairy farmer members in the states of Iowa, Illinois, Indiana, Ohio, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin;[2] (2) processors and processor trade associations located in Texas, Ohio, Pennsylvania, Indiana, Illinois, and Wisconsin;[3] and (3) members of the United States Congress seeking to protect their respective dairy industry constituents from trade barriers, including the Honorable Herb Kohl, a United States Senator representing the State of Wisconsin; the Honorable Rod Grams, a United States Senator representing the State of Minnesota; the Honorable Russell Feingold, a United States Senator representing the State of Wisconsin; the Honorable John Boehner, a member of the U.S. House of Representatives from the State of Ohio; the Honorable Mark Green, a member of the U.S. House of Representatives from

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[1] No part of this brief was authored, in whole or in part, by counsel for any party to this proceeding, nor has any person or entity (other than amici) made any monetary contribution to the preparation or submission of this brief. Additionally, all parties to this appeal have consented, in writing, to the filing of this brief. Copies of their respective consents are appended hereto.

[2] Associated Milk Producers, Inc., Foremost Farms USA, First District Association, and Minnesota Milk Producers Association.

[3] This group of amici includes the trade associations of Midwest Dairy Foods Association, Inc., Wisconsin Dairy Products Association, and Suiza Fluid Dairy Group, a processor with plants operating in several states across the country. Suiza Fluid Dairy Group joins this brief solely out of its concern that the First Circuit's decision, if not corrected, has the potential for serious adverse effects in federal marketing areas west of the Mississippi River.

the State of Wisconsin; the Honorable Gil Gutknecht, a member of the U.S. House of Representatives from the State of Minnesota; the Honorable Ron Kind, a member of the U.S. House of Representatives from the State of Wisconsin; the Honorable Collin C. Peterson, a member of the U.S. House of Representatives from the State of Minnesota; and the Honorable Paul Ryan, a member of the U.S. House of Representatives from the State of Wisconsin.

They join in urging review of the First Circuit's decision of this matter out of their concern that the First Circuit's decision, by straying from settled milk-regulation principles laid down by this and other Courts as well as in the federal milk regulation program, might subvert long-standing economic rules established to prevent the creation by regulators of artificial cost advantages to particular processors and their producers simply because of regulatory status.

When Congress authorized the Northeast Interstate Dairy Compact ("the Compact") in 1996, Congress placed explicit limiting conditions on the operation of the Compact. 7 U.S.C. § 7256(7) (1999) (effective Apr. 4, 1996). The relevant limitations are as follows: (1) the Compact Commission was prohibited from limiting in any way the marketing in the Compact region of milk produced outside that region; (2) the Compact Commission was directed to "respect and abide by the ongoing procedures between Federal milk marketing orders with respect to the sharing of proceeds from sales within the Compact region" of milk products originating outside the region; and (3) the Compact Commission was prohibited from using "compensatory payments", "as a barrier to the entry of milk into the Compact region or for any other purpose."

That Congress intended for the Federal Milk Marketing Order Program to serve as the prototype for the administration of the Compact is obvious throughout this express statement of limitations. In the first clause, for example, Congress used language that tracks the language in the Agricultural Marketing Agreement Act of 1937 (AMAA). *See* 7 U.S.C. § 608c(5)(G) (1999). In fact, the language contained in 7 U.S.C. § 608c(5)(G) has served as the basis for limiting the conduct of federal milk regulators as to partially regulated processors,[4] and has been relied upon to distinguish between lawful and unlawful compensatory payments for decades. *See Lehigh Valley Cooperative Farmers, Inc., et al. v. United States et al.*, 370 U.S. 76 (1962); *Sani-Dairy v. Espy*, 91 F.3d 15 (3d Cir. 1996) *aff'g Sani-Dairy v. Yeutter*, 939 F. Supp. 410 (W.D. Pa 1993); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992); *County Line Cheese Company, et al. v. Lyng, et al.*, 823 F.2d 1127 (7th Cir. 1987).

Given the interrelationship established by Congress between the AMAA, the federal marketing program, and the Compact, it follows that decisions regarding the administration of the Compact may well impact the administration of the federal marketing program.

The First Circuit's opinion in this matter suggests that the existence of a *de minimis* pool distribution would make otherwise unlawful charges lawful, and thus might permit regulators to disregard whether such charges render the total product costs to

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[4] The word processor will be used interchangeably with the regulatory term "handler," and refers to entities that purchase and convert raw milk into finished products such as beverage (fluid) milk, cream, ice cream, and cheese.

out-of-region (*i.e.*, partially regulated) processors higher than the total product costs to in-region (*i.e.*, fully regulated) processors. This proposition conflicts directly with settled milk-regulation law, and could, if extended, be devastating to the stability of the regulated milk-marketing industry.

A central premise of the federal milk regulatory program has long been that stability within and among milk-marketing regions is promoted by equalizing raw-product costs for processors competing in a given market. If some processors are favored in a regulatory scheme by being granted lower product costs, a competitive imbalance is introduced which will threaten stability and orderly marketing, to the economic detriment of the disfavored processors, and the farmers who sell their milk to them, as well as to consumers of milk products. *See Zuber v. Allen*, 396 U.S. 168 (1969). Thus, the federal milk regulation program avoids the destructive short-term competition associated with non-uniform product costs by expressly mandating uniformity of product costs among processors. *See* 7 U.S.C. § 608c(5)(G).

The ruling by the First Circuit in this case ignores the core concept of uniformity of processor costs. By ruling that the Compact may impose on partially regulated processors a mandatory "charge and rebate" mechanism that ignores actual product costs incurred by these processors, the First Circuit decision effectively permits the Compact to impose non-uniform costs. As processors and producers, and as elected representatives of processors and producers, the amici are concerned that as a result of the First Circuit decision, they, or their constituents, may be burdened with the artificial competitive disadvantage, and associated loss of customers and markets, that is created when regulators impose non-uniform product costs, particularly if the

decision transcends the Compact and is applied within the federal milk regulation program.

Moreover, the amici are seriously concerned that because there is now a conflict within the circuits, between the Third Circuit decision in *Sani-Dairy v. Espy*, 91 F.3d 15 (employing the analytical framework set forth by this Court in *Lehigh)* and the First Circuit decision in *New York State Dairy Foods, Inc. v. Northeast Compact Commission*, 198 F.3d 1 (1st Cir. 1999) (ignoring the analytical framework set forth in *Lehigh)*, future courts confronted with similar issues will not have clear guidance. Accordingly, the amici urge this honorable Court to grant the petitions of New York State Dairy Foods, Inc. and Cumberland Farms, Inc., so that this Court will have the opportunity to re-establish with unambiguous clarity the principle that milk regulatory provisions that impose a mandatory charge upon partially regulated processors, without regard to whether that charge renders their total product cost higher than the regulated product cost for fully regulated processors, are unlawful.

SUMMARY OF ARGUMENT

Congress in approving the Northeast Dairy Compact made clear that its consent was conditioned upon the Compact Commission's erecting no economic trade barrier that would limit or discourage the shipment of milk into the Compact region from outside that region.

While approving the central Compact purpose of maintaining higher milk prices in the Compact states than might otherwise exist, Congress made clear that there was to be no Compact provision that would place dairy farmers and processors

located outside the Compact region at a competitive disadvantage in selling their products into the region.

The issue of equalizing product costs between sellers inside a regulated market, and those located outside and shipping into it, arose years ago in the federal program of milk-marketing regulation, and was resolved by this Court. In 1962, this Court in *Lehigh Valley*, 370 U.S. 76, enunciated the fundamental principle that federal regulators could not impose a charge (commonly called in the industry a "compensatory payment") upon out-of-market processors without taking into account those processors' actual existing product costs, because to do so would violate the anti-trade-barrier provision of the AAMA, 7 U.S.C. § 608c(5)(G) by placing those processors at a competitive disadvantage vis-a-vis processors within the regulated market. More recently in 1996, the Third Circuit in *Sani-Dairy*, 91 F.3d 15, affirmed and extended the rule that such charges may not be imposed in the federal regulatory program.

Congress by expressly prohibiting trade barriers and discriminatory compensatory payments, and by expressly adopting established federal regulation principles for dealing with milk shipped into a regulated market, plainly conditioned its Compact consent upon there being no charges of the kind under challenge in this case.

Because the charge levied by the Compact Commission does not in any way take into account the actual product costs already being borne by out-of-region processors, it is an arbitrary and discriminatory charge of the kind beyond Congress' consent. If, in the face of Congress' limiting conditions, the Compact Commission is permitted by means of this kind of charge to

discourage out-of-region processors from shipping their milk into New England, then the long-settled law of regulating inter-market shipments of milk in the federal program will likewise be subjected to risk and uncertainty, given the plain conflict between the First Circuit's Compact decision in this case and the Third Circuit's federal-regulation decision in the 1996 *Sani-Dairy* case.

ARGUMENT

A. Partial Regulation Through the Imposition of A Mandatory Compact Premium Constitutes An Unlawful Compensatory Payment As Defined By This Court in *Lehigh Valley Cooperative v. United States* and by the Third Circuit in *Sani-Dairy v. Espy*, and Therefore Violates the Limitations Set Forth By Congress in its Consent to the Compact

(1) Compensatory Payments Are Commonly Imposed in the Federal Marketing Program to Equalize Product Costs Between Fully Regulated and Partially Regulated Processors.

Congress' consent to the Northeast Interstate Dairy Compact contemplated on its face that the Compact would be administered according to established federal milk marketing principles. Since compensatory payments are nowhere defined in Congress' consent to the Compact, and such consent was written against the backdrop of well-established principles in the federal regulatory program, the prohibition against discriminatory compensatory payments necessarily takes its meaning from these established principles.

Partial regulation of processors is a familiar concept in the federal milk program. Generally speaking, partial regulation involves rules imposed upon processors located outside of, but selling milk into a regulated territory. Typically, the processor will be partially regulated unless and until its sales in the regulated territory exceed a particular percentage of gross sales (which under present rules is 25%) in which case such processors become fully regulated.

Partial regulation is the method by which regulators ensure that parties beyond the reach of full regulation do not receive artificial cost advantages. In the federal milk program, therefore, partially regulated processors are given the opportunity to choose among various devices of partial regulation, which include (1) some form of compensatory payment, wherein a pool payment obligation is assessed to ensure that product costs rise to the level of the minimum product value established by minimum price regulation for fully regulated processors; or (2) voluntary reporting of actual product costs attributable to other factors, such as extraterritorial regulations and/or market forces, wherein the market administrator analyzes the actual amount paid for raw product, to determine if the actual amount exceeds the minimum prices being charged to fully regulated handlers, in which case, no pool payment will be assessed (this is commonly referred to in the industry as "the Wichita option"). *See e.g.*, 7 C.F.R. 1004.76 (1999).

In all cases, the purpose and effect of partial regulation is to protect the fully regulated processors and their producers from the type of unfair competition (and customer loss) associated with unregulated processors being able to undercut the prices of fully regulated processors. By their very nature these tools exist mainly as a method of ensuring orderly marketing and equalizing product

costs among handlers. However, such mandated payments are struck down to the extent they subject partially regulated processors to raw product costs that make sales into the regulated territory more costly than for their fully regulated counterparts. Partial regulation effected through similar methods has existed since the inception of the federal marketing program.

In this regard, Congress' consent to the partial regulation of processors located outside of, but shipping into, the Compact region, accompanied by an express mandate to abide by "ongoing procedures between Federal milk marketing orders" must have contemplated the use of similar devices by the Compact.

(2) This Court and Other Courts Have Prohibited the Secretary of Agriculture From Imposing Compensatory Payments that Cause Partially Regulated Processors to Incur Higher Raw Product Costs Than Fully Regulated Processors.

Congress consented to the Compact with provisos that the Compact Commission (1) would not erect trade barriers that prohibit or in any way limit the shipment of out-of-region milk into the Compact region, and (2) would not use compensatory payments as a barrier to the entry of milk into the Compact region or for any other purpose. 7 U.S.C. § 7256(7). Since compensatory payments are not expressly defined by Congress in the authorizing legislation, understanding what Congress meant by these limiting conditions requires reference to the similar limitations long established in the federal regulatory framework.

The AMAA, which serves as authority for the federal milk regulation program, imposes limits on the Department of Agriculture's power to regulate interstate sales of milk. In particular, the Department of Agriculture has long struggled to strike a balance between the competing mandates of (1) maintaining uniform handler costs, and (2) prohibitions on trade barriers. 7 U.S.C. § 608c(5)(A) and (G). As discussed in the Interests of the Amici, the requirement of uniformity of costs among handlers protects fully regulated processors and their producers from loss of markets to partially regulated processors, who because of differences in regulations, could have artificial cost advantages over fully regulated processors. In the 1950's, in its effort to ensure uniform costs among handlers located in and out of a regulated territory, the Department of Agriculture began to impose "compensatory payments" (pool payments required of handlers located outside of regulated territory, but selling into regulated territory to ensure that handler costs are uniform). However, the compensatory payment scheme became in a sense too effective, in that there were circumstances in which product costs associated with factors external to the compensatory payment, when combined with the fixed charge, made it more costly for the partially regulated processor than for the fully regulated processor.

Relying on the AMAA's express prohibition against trade barriers in section 608c(5)(G), this Court in 1962 made clear that the lawfulness of a compensatory payment charge cannot be ascertained without considering the unregulated (or partially regulated) processor's actual product costs. *Lehigh Valley,* 370 U.S. 76. This Court reasoned that the need for compensatory payments was based on the presumption, which was not always correct, that out-of-region or partially regulated processors could obtain milk more cheaply than those subject to full regulation. *Id.*

at 84-85. This Court recognized that sometimes, however, other regulatory or market factors, serve to ensure that the partially regulatory processor is paying as much or more for raw product. *Id.* Thus, in these circumstances, the additional obligation associated with a fixed mandatory pool payment would disadvantage the partially regulated processor and tend to discourage the marketing of such milk into the area imposing the mandatory payment. *Id.*

After reviewing the legislative history surrounding the drafting of 7 U.S.C. § 608c(5)(G) and determining that "prohibit" as referred to in section 608c(5)(G) "refers not merely to absolute or quota physical restrictions, but also encompasses economic trade barriers ....", *id.* at 97, this Court found that a mandatory pool payment obligation, such as the compensatory payment provision in the case before it, created the potential for economic trade barriers, thus making the provision illegal. *Id.*

In the aftermath of *Lehigh*, the Department of Agriculture continued to utilize compensatory payments, but most often in conjunction with an alternative form of partial regulation known as the Wichita option. *See e.g.*, 7 C.F.R. 1004.76 (1999); *see also* 29 Fed. Reg. 9001, 9109, and 9213 (July 7, 1964). The Wichita option addressed the concern expressed by this Court in *Lehigh* for consideration of actual costs before imposing compensatory payments to equalize costs that do not actually need equalizing. When the Wichita option is available, the risk that the processor will suffer an unfair cost disadvantage is removed.

As late as the 1990s, however, the Wichita option was still not universally available throughout the federal milk regulation system (and is still not available to particular entities shipping into

marketing areas west of the Mississippi). This gave the Third Circuit the opportunity to confirm that the trade barrier ramifications of partial regulation provisions such as compensatory payments must be assessed in light of the partially regulated processor's actual product costs. *Sani-Dairy*, 91 F.3d 15. This particular decision is significant because, as in the Compact, Sani-Dairy, a partially regulated processor, was subject to the same mandatory pool payment obligation on fluid milk sales into the region as fully regulated processors. *Id. aff'g* 939 F. Supp. at 412-413. Also as in the Compact, Sani-Dairy (on behalf of its dairy farmers), being partially regulated, was not granted all of the benefits of pooling. The Third Circuit followed *Lehigh* and found that the product costs incurred outside of, and prior to action taken by regulators, exceeded the total minimum regulated product cost imposed on fully regulated processors, and thus determined that the imposition of the mandatory pool obligation placed Sani-Dairy at an unfair cost disadvantage relative to fully regulated processors, and was therefore unlawful. *Id.*

Thus, a compensatory payment is lawful when it accounts for actual product costs, or is offered in conjunction with an alternative that takes actual product costs into account. On the other hand, a compensatory payment is unlawful and violative of the anti-trade barrier provisions of section 608c(5)(G) when it is set arbitrarily and therefore has the potential to cause a partially regulated processor's total costs (*i.e.*, product costs plus compensatory payment obligations) to exceed the total minimum regulated cost to processors within the regulated market.

(3) The First Circuit Erroneously Assumed That the Compact Commission's Discrimination Against Out-of-Region Processors Was Not a Prohibited Compensatory Payment.

Notwithstanding the long history of assessing the validity and trade-barrier implications of devices, such as compensatory payments, to effectuate partial regulation by measuring actual product costs as opposed to presumed product costs, the First Circuit in this case ruled that the Compact charge at issue was by definition not a prohibited compensatory payment.[5] The Court's decision was based on a perceived, albeit incorrect, distinction between compensatory payments and pool payments, explaining that under a compensatory payment system, the partially regulated plant would receive no disbursements whatsoever from the pool. According to the Court's view, the distinction is vital because it eliminates the primary objection to compensatory payments – that compensatory payments force handlers outside the pool to pay what amounts to a tariff upon entry into the regulated territory.

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[5] The compact charge and the accompanying pool distribution is the mechanism by which the Compact effectuates partial regulation. In particular, partially regulated processors (those located outside of the compact but selling into the compact) and fully regulated processors all pay a *fixed* amount into the Compact pool. However, fully and partially regulated processors receive different pool distributions to pass on to their producers. The partially regulated processor receives less than the fully regulated processors because the Compact pays a pool distribution on the fully regulated processors entire volume (all classes) of milk, while it pays a pool distribution only on the partially regulated processor's volume of Class I milk sales into the Compact. *See* 7 C.F.R. 1301, 1304 and 1307; *see also New York State Dairy Foods Inc. et al v. Northeast Dairy Compact Commission et al.*, 26 F. Supp. 2d 249, 256-57 (D. Mass 1998).

In concluding, as it did, that the very existence of any pool distribution to partially regulated processors (even one that is smaller than that which is paid to fully regulated processors thus resulting in a higher net compact charge on out-of-region milk) eliminated any trade barrier ramifications associated with charging the compact premium to partially regulated processors, the First Circuit demonstrated inadequate regard for the decades of judicial precedent and regulatory precedent during which this Court, various Courts of Appeals, District Courts, and the federal Department of Agriculture, determined that partial regulation may not be effected through mandatory pre-established pool payment obligations. *Lehigh*, 370 U.S. 76; *Sani-Dairy*, 91 F.3d 15; *Farmland Dairies*, 789 F. Supp. 1243; *County Line Cheese*, 823 F.2d 1127.

The First Circuit appears to have been misled by form over substance. Granted, the compact charge and corresponding rebate are different in form from the compensatory payments struck down in earlier cases. It is nonetheless the case, however, that the compact charge and corresponding, albeit reduced, rebate represent the Compact's chosen method of partial regulation. A fully regulated processor would receive a full rebate. Thus, it follows that the compact charge and reduced rebate serve, as do all partial regulation devices, to protect fully regulated processors and their producers from unfair competition and lost markets associated with regulation-induced cost differences.

In addition, the Compact "charge and rebate" has the same substantive effect as the traditional compensatory payment. The Compact "charge and rebate" mechanism, by its mandatory and pre-established nature, leaves open the possibility that an out-of-region processor facing actual product costs, generated by factors external to the Compact, that match or exceed the total minimum

price obligation of in-region processors, will be placed at a cost disadvantage relative to his fully regulated counterparts. This possibility will only be further exacerbated according to the District Court's finding in this case that the lesser rebate applied to out-of-region milk discriminates against and subjects out-of-region milk to a competitive disadvantage. *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission, et al.*, 26 F. Supp. 2d 249, 256 (D. Mass. 1998). However, unlike lawful compensatory payments, there is nothing about this method of partial regulation (like the Wichita option) that safeguards against a trade barrier effect.

The compact "charge and rebate" mechanism is mandatory, and imposes on the partially regulated processor a pre-established obligation, which depending on the processor's actual product costs, may or may not competitively disadvantage that processor. Just as the partial regulation mechanisms in *Lehigh* and *Sani-Dairy* were struck down for their potential trade barrier impact and the absence of safeguards, so too should the "charge and rebate" mechanism at issue in this case be struck down. Thus, the First Circuit was simply mistaken when it ruled that the existence of the rebates substantively distinguishes the Compact device from other forms of compensatory payments.[6]

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[6] To avoid the tariff-like impact of the mandatory compact charge and reduced rebate, the Compact would need to track the federal milk regulation provisions pertaining to partial regulation by providing partially regulated processors with a choice between paying the compact premium and receiving on behalf of its producers the reduced rebate on the one hand, and opening its books to establish that actual costs meet or exceed those of fully regulated processors on the other hand. *See, e.g.*, 7 CFR 1004.76 (1999).

By concluding that the mere existence of a pool distribution, no matter how small or large, to a partially regulated handler removes the trade barrier implications associated with compensatory payment provisions, the First Circuit created at least confusion and potentially a dangerous regulatory loophole for the administration by the Compact Commission of previously unlawful compensatory payments.

B. The Confusion Created By the First Circuit's Decision For The Northeast Compact Could Be Employed By Prospective Proponents Of Trade Barriers In The Federal Program In An Effort To Revive The Practice Of Charging Unlawful Compensatory Payments.

Given heavy reliance by Congress on the principles and procedures of the federal milk regulation system in formulating its Consent to the Northeast Compact and the First Circuit's reference to judicial precedent analyzing provisions of the federal milk regulation system, the First Circuit's decision threatens to undermine long-standing principles and precedent defining the trade barriers prohibited by 7 U.S.C. § 608c(5)(G).

The mere existence of a rebate on a mandatory pool payment does not remove the risk that the net charge to partially regulated, or out-of-region, processors could in fact disadvantage them, and thus tend to discourage the marketing of milk into the regulated area. Nonetheless, the First Circuit in this case suggests that the existence of a rebate, no matter how large or small relative to that received by fully regulated processors, somehow should insulate such a mechanism from any trade barrier analysis whatsoever. *New York State Dairy Foods*, 198 F.3d at 10. Thus,

the First Circuit decision, read broadly, suggests there is no circumstance under which judicial review of such a mechanism would be appropriate.

It is possible, therefore, that the First Circuit decision in this case, if not reversed, could be used by those that might benefit from trade barriers to attempt to persuade federal regulators to apply the First Circuit's erroneous logic to federal milk regulation. Federal regulators might, for instance, be urged to formulate some sort of rebate mechanism to insulate from scrutiny otherwise unlawful compensatory payment provisions.

In addition, if a rebate mechanism places partially regulated processors at a competitive disadvantage, the First Circuit decision in this case suggests that these processors would not be entitled to enforce their rights protected under section 608c(5)(G) and this Court's decision in *Lehigh*. A decision that would suggest or permit such a result is dangerous to the processors, producers, and the public, all of whom have come to rely upon a federal milk regulation program that does not erect economic barriers to milk movement between markets.

CONCLUSION

For the foregoing reasons, the amici urge the Court to grant the petitions for *writ of certiorari*.

Respectfully submitted,

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No. 99-1437, 99-1438

In The

Supreme Court of the United States

NEW YORK STATE DAIRY FOODS, INC., *et al.*,

Petitioners,

v.

NORTHEAST DAIRY COMPACT COMMISSION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY BRIEF (No. 99-1438)

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REPLY BRIEF FOR PETITONERS

The opposition brief of respondent relies on a dissembled and reassembled statement of the principal claims advanced by petitioners to the agency tribunal and federal courts below. As described below, petitioners' focus on the significant Commerce Clause, Conditions of Compact Clause Consent, and conflict of pecuniary interest issues from the very beginning of this controversy is demonstrated by their early "Objections" to the Commission's "Proposed Findings of Fact, Conclusions of Law, and Decision," which is reproduced in the attached Supplemental Appendix ("Supp. App.")[1] As reinforced by the *amicus curiae* brief of United States legislators and dairymen from other parts of the country, respondents' additional dismissal of the Third Circuit's decision in *Sani-Dairy* as presenting no circuit split, where USDA's effort to price and pool a portion of the milk supply of a partially-regulated plant was condemned as an unlawful "compensatory payment," grossly misses the mark since that was the same form of pricing arrangement relied upon by the Commission and approved by the First Circuit.

The questions presented are significant not only to compact agencies and ratemaking boards, but also to the future administration of dairy compact legislation approved by 19 additional states and waiting for Congressional approval.[2]

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[1] Also included in the Supp. App. are available minutes of the full Commission's consideration of the petitions. Minutes from the September 25, 1997, closed-door executive session deliberation by the full Commission on petitioners' claims were prepared, but not provided by the Commission as part of the administrative record before the lower court. *See* Supp. App. 22-23, 25.

[2] *See* Northeast Compact Commission, *Compact Efforts in Other Parts of the Country* (http://www.dairycompact.org/country.htm) and Southeast Compact, *Map of Participating Compact States*, http://www.agr.state.nc.us/markets/commodit/dairy/map.htm.

I. THE COMPACT COMMISSION'S STATEMENT OF PROCEDURAL HISTORY DOES NOT FAIRLY OR ACCURATELY REFLECT CLAIMS AS PRESENTED BELOW.

A. Commerce Clause Claims (Reply to respondents' brief, pp. 2, 7–12)

As the district court drolly observed, "the beef that generated this suit" is fixed price regulation combined with differential redistribution of pooled compact revenue to dairy farmers based upon location of the receiving plant within or without New England. *New York State Dairy Foods, Inc., v. Northeast Dairy Compact Commission*, 26 F. Supp. 2d 249 (D. Mass. 1998); Pet. App. 56. In the example given by the district court for one month, which "the Commission does not dispute," the differential redistribution for one month placed "the New York handler at a $76,000 competitive disadvantage." 26 F. Supp. 2d at 256-57; Pet. App. 54-55. There is no basis for respondents' representation to this Court that the Commerce Clause contentions were "new" when presented to the federal district court,[3] or that the New York processors' "primary challenge" before the agency and

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[3] Although not precisely before the Court in this case, the Commission gratuitously claims that, under Compact rules, "[a] farmer in New York (outside the region) that supplies a pool [i.e., New England] plant is treated exactly like a farmer in Vermont (in the region) supplying a pool plant." This is flatly untrue. Special limitations for any "dairy farmer who produces milk outside of the regulated area" severely limit the ability of out of region farmers to receive the same benefits as their New England peers when their milk is delivered to pool plants (7 C.F.R. 1301.11(b); Pet. App. 192-93). The Commission later limited pooled revenue benefits, uniquely affecting New York farms, when milk is diverted from the pool plant to manufacturing plants near the originating farm, but "located outside of the regulated area." 7 C.F.R. 1301.23 (1998), as amended by 63 Fed. Reg. 65517 (Nov. 27, 1998).

district court was one of Compact statutory construction (Commission Brief at 8, 9-10).

The district court judge correctly perceived that petitioners' "primar[y] challenge" to this discriminatory pricing feature was that it violated the Commerce Clause (Pet. App. 67); but she ultimately concluded that the Commission's scheme for "pricing and pooling of partially regulated plants ... is not precluded by ... Condition 7 of the Congress' consent to the Compact, or the Commerce Clause." Pet. App. 73. The First Circuit Court's decision echoed that petitioners' "...frontal assault on the over-order pricing regime...[is] based on the Commerce Clause..." (*New York State Dairy Foods v. Northeast Dairy Compact Commission*, 198 F. 3d 1 (1st Cir. 1999); Pet. App. 16. Like the agency and district court, the circuit court understood that the Commerce Clause issues turned on "the scope of [Congress'] consent" to the Compact. Pet. App. 18.

These issues also framed petitioners' claims before the Commission. The Commission panel answered the adjudicatory petition and supporting affidavits with a "Proposed Findings of Fact, Conclusions of Law, and Decision" as its only responsive pleading. Petitioners promptly filed their Objections (Supp. App. 1), which focused on the differential redistribution of compact producer prices as the factual basis for their claims (Supp. App. 6-7, 19-20) and which contained the same uncontested example of "competitive disadvantage" adoped by the district court. Applying the law to these facts, petitioners plainly asserted that Congress' proscription against any "limit" on out-of-region milk preserved application of the Dormant Commerce Clause to interregional milk commerce (Supp. App. 9-11) because Congress did not unmistakably permit creation of a competitive disadvantage of this type (or of any type). Indeed, petitioners' conclusions summarized that their claims were simply that Congress did not immunize the Commission

pricing rules' extraterritorial reach from the Commerce Clause or from competitive discrimination scrutiny (Supp. App. 17-18).

B. Conflict of Interest Claims (Reply to respondents' brief, pp. 8, 24).

The New York processors' original adjudicatory petition to the Commission made several specific requests designed to insulate the adjudication process from influence or participation by the Commission's financially-interested farmers and processors. After the Commission panel denied each of these requests (Pet. App. 143-45), petitioners submitted Objections which expressly cautioned that the Commission's "producers or processors ... have a direct pecuniary interest in the outcome [and] should be disqualified from voting on an over-order price *or other quasi-adjudicatory matters*" (Supp. App. 4-5, emphasis supplied).

It was in this context that only a week later the full Commission, with unrestricted participation of its farmer and processor members, convened in executive session to deliberate on petitioners' claims and then unanimously voted to deny petitioners' claims (Minutes of Sept. 25, 1997, Supp. App. 22-23). Notwithstanding the Commission's own requirement that a Commission member "*shall*... disqualify himself or herself from consideration of the Commission's final ruling on the panel's decision if that commissioner's impartiality might reasonably be questioned" (7 C.F.R. 1381.4(h)(3), emphasis supplied), no farmer or processor was recused from deliberations or the final vote.[4]

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[4] In a subsequent decision on Elmurst Dairy's petition, one dairy farmer and one processor member recused themselves from the final vote, but it is unclear whether they participated, along with non-recused farmers and processors, in the executive session deliberations. Supp. App. at 24-25.

It was also in this context that the district court concluded that the Due Process/conflict of pecuniary interest claims were preserved for federal court review, explaining that the rate-making and adjudication challenges based on conflict of pecuniary interest "conflate." Pet. App. 77, footnote 12. Respondents' suggestion that these issues were somehow waived or "procedurally defaulted" (brief at 19, 24) distorts the administrative record and stretches beyond any reasonable elastic limit the circuit court's later observation that petitioners' due process objections addressed to the Commission did not come packaged in a pleading entitled 'motion to disqualify.' Pet App. 36. Like the district court, the court of appeals proceeded to address the merits of the conflict of pecuniary interest issues in agency adjudication as well as ratemaking, and its unique resolution of the merits frames the question before this Court.

II. THE LOWER COURT'S *APPLICATION* OF THE UNMISTAKABLE CLARITY STANDARD FOR CONGRESSIONAL CONSENT TO COMMERCE CLAUSE VIOLATIONS, NOT ITS FAILURE TO ARTICULATE THE STANDARD, FRAMES THE ISSUE. (Reply to respondents' brief, pp. 13-17)

The Commission artfully evades the heart of the significant Commerce Clause questions raised in the Petitions by recasting the issue as whether "the lower court properly set forth the well-established standard for finding Congressional consent in the Commerce Clause context...." Brief at 14. But in the context of this first conditional Congressional approval of an interstate compact to regulate the marketing and pricing of an agricultural commodity, the specific questions presented have far broader consequence in Commerce Clause jurisprudence.

Carefully omitted from the Commission's brief, and pointedly disregarded in the appeals court's resolution of

Commerce Clause issues, is the condition imposed by Congress that the "Commission shall not ... in any way limit the marketing in the compact region of any milk or milk product produced in any other production area in the United States." 7 U.S.C. § 7256(7). This clause is the focus of arguments by petitioners that the court below strayed from proper application of the "unmistakable clarity" standard when it based its decision on the words of the Compact rather than the words of Congress. Cumberland Petition at 24; New York State Dairy Foods' Petition at 12-13.[5]

III. THE THIRD CIRCUIT'S *SANI-DAIRY* DECISION STANDS IN SQUARE CONFLICT WITH THE LOWER COURT'S CONCLUSION THAT "PRICING AND POOLING OF MILK" SANITIZES THE COMPACT'S SCHEME OF COMPENSATORY PAYMENT CONCERNS (Reply to respondents' brief, pp.17-19)

Although "compensatory payment" is a term of art which evolved over the course of 50 years under USDA's federal milk pricing program, the court below accepted the Commission's interpretive claim that "pricing and pooling" of a partially regulated plant's milk sales into the regulated market was sufficiently different in form from the method of partial regulation condemned in *Lehigh Valley Cooperative Farmers v. United States*, 370 U.S. 76 (1962), to avoid substantive scrutiny as a "compensatory payment" – the only

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[5] Although finding unmistakable clarity in the threshold fact of Congress' consent to the Compact, the district court antithetically applied *Chevron* deference to the Commission's interpretation of sections 10(6) and 10(7) of the Compact statute to define the scope of its own authority to burden interregional commerce. Pet. App. 65-66, 71-73. The circuit court did not rely on *Chevron*, but also deferred to the Commission's interpretation and found that Congress prohibited *only one* form of interregional trade barrier which the court believed the Commission had avoided. *Id.* 20-25.

form of trade barrier which the lower court recognized Congress to have prohibited. Pet. App. 24-25.

Just as Commerce Clause analysis requires examination of the practical effect rather than the form, formula or label applied by a state to economic barriers, *West Lynn Creamery v. Healy*, 512 U.S. 186, 114 S. Ct. 2205, 2215-16 (1994), Congress' proscription against compensatory payments is applied by consideration of practical effect. *Lehigh Valley*, 370 U.S. at 83-91. The *Sani-Dairy* court demonstrated allegiance to this principle when it conducted an evidentiary hearing and concluded that the pricing and pooling of milk sold by the partially-regulated handler into the federally-regulated New York market did not insulate the UDSA pricing scheme from compensatory payment analysis (*Sani-Dairy v. Espy*, 939 F.Supp. 410, 413-15 (W.D.Pa), *aff'd* 91 F. 3d 15 (3rd Cir, 1996).

Although the importance of *Sani-Dairy's* partial pooling analysis, and its similarity to the Compact Commission's partial pooling of New York plants, was brought to the attention of the court by appellants' briefs below, the First Circuit chose to deal with the conflict by ignoring *Sani-Dairy*.[6] The Commission now tries to explain the conflict away without acknowledging the partial pooling feature of the federal rule at issue (Commission brief at 17-18). It is this feature which makes the Commission's partial pooling and pricing scheme indistinguishable in substance as well as in form from the compensatory payments condemned in *Sani-Dairy*. The potential of this conflict between the First and Third Circuits to infect the federal milk order program, as further explained in the *amicus curiae* brief filed by midwest dairy farmers, processors, and United States

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[6] The Commission incorrectly represents to this Court that the First Circuit's decision below addressed *Sani-Dairy* and "found the circumstances presented in that case distinguishable." Commission brief at 17.

legislators, underscores the desirability of this Court's resolution of the conflict.

IV. WHETHER SIGNIFICANT AND DIRECT FINANCIAL INTEREST DISQUALIFIES MEMBERS OF PRICING BOARDS, AS THE HIGHEST COURTS OF MICHIGAN AND NEW HAMPSHIRE HAVE HELD BUT VIRGINIA HAS REJECTED, AND WHETHER A SECOND STAGE "DELEGATION" VOTE IN AGENCY ADJUDICATION CLEANSES THE PROCESS OF PECUNIARY CONFLICT AT THE FIRST STEP, REMAIN SINGIFICANT DUE PROCESS QUESTIONS WHICH ARE UNRESOLVED BY THIS COURT.

We now return to the conflict of pecuniary interest question, to which the Commission devoted much of its procedural reconstruction and most of its argument (brief at 19-24).

A. Conflict of Interest in Ratemaking

The circuit court (Pet. App. 31), and the Commission (brief at 20), ultimately base their conclusions of unchecked dairy farmer and processor participation in decisions to fix the price or rebate they will receive on the notion of "a significantly lower bar" to disqualification from conflict of interest in ratemaking than in adjudication.[7] It is because the level of the ratemaking bar under the Due Process Clause has

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[7] The Commission observes that "slight" pecuniary interest is not disqualifying in any deliberative context (brief at 20), but does not challenge petitioners' summary of the interest as about $14,700 per year for the average New England farmer, and $34,000 per year or more for the region's larger farms (NY State Dairy Foods' Petition at 7). This case does not require a new definition of "significant" by which to measure pecuniary interest disqualification, since these pricing revenues are "significant" by any measure.

not been clarified by this Court since *Railroad Comm'n v. Pacific Gas & Electric Co.*, 302 U.S. 388, 393 (1938) (instructing that "well-settled principles governing the proceedings of rate-making commissions... [require that] the procedure must be consistent with the essentials of a fair trial."), and state courts have come to conflicting conclusions about what standards apply to pecuniary interest conflicts in milk pricing cases, that these issues are clearly proper for certiorari review.[8]

The Commission's spin of the state court decisions unfairly masks the conflict. Petitioners directed this Court's attention to *New Hampshire Milk Dealers' Association v. New Hampshire Milk Control Board*, 107 N.H. 335, 222 A.2d 194 (1966), and brought that case to the Commission's attention in their first brief to the agency tribunal (Supp. App. 2), because of its clear articulation of the principle that milk price ratemaking or adjudication unequivocally requires disqualification of financially-interested decisionmakers. This controlling principle was not somehow diluted, as implied by the Commission (brief at 22), because the state court found in its application that the board member was not possessed of a disqualifying conflict as alleged by the milk dealers.

Johnson v. Michigan Milk Marketing Board, 295 N.W. 346 (Mich. 1940), applied the same standard as the later New Hampshire case, and found that the farmer and processors' participation on pricing matters was constitutionally disqualifying, while the Virginia Court pointedly disagreed with *Johnson* in its tolerance of the kind of "lower bar" advanced by the Commission in this case. *Board of Supervisors v. State Milk Commission*, 60 S.E.2d 35 (Va.

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[8] As emphasized by respondents in their argument heading (brief at 19), most state (and federal) high court decisions relied upon by petitioners are "decades old." If it is simply the case that the conflict bar in procedural due process jurisprudence isn't what it used to be, that alone is sufficient to merit a clear statement by this court on review.

1950). The only "critically different" fact advanced by respondent for Compact Commission proceedings is that its financially-interested members, after deliberating as a group, first vote in state delegations, and the delegations then cast their state votes to produce the final Commission decision (brief at 23). Whether this novel two-step form of voting is sufficient in Constitutional substance to cleanse or attenuate any pecuniary infection influencing the first vote, and may therefore serve as a blueprint for other agencies, is precisely the type of controversy which merits this Court's review.

B. Conflict of Interest in the Agency's Adjudication

The Commission advances only one non-procedural argument to avoid certiorari review of petitioners' claims that participation of farmers and processors in the closed-door deliberations of the full Commission, and in the Commission's vote to deny the relief requested, is incompatible with traditional due process standards. That is, again, the two-step delegation-based voting procedure which, according to the Commission's characterization of the decision below, somehow protected the final result from "the possibility of improper influence by individual members." Commission brief at 24, *citing* the appeals court's decision at Pet. App. 36. On review of this clearly adjudicatory process, the question for this Court is whether the Commission has discovered a Constitutionally permissible tool by which to wedge financially interested persons as qualified participants in matters concerning which they have a substantial pecuniary interest.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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April 18, 1999

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SUPPLEMENTAL APPENDIX A

NORTHEAST DAIRY COMPACT COMMISSION

IN RE: PETITIONS OF CROWLEY)
FOODS, etc. (consolidated cases)) Docket No. HEP-97-001

IN RE: PETITION OF MARCUS)
DAIRY) Docket No. HEP-97-003

PETITIONER'S OBJECTIONS TO "PROPOSED FINDINGS, FACT, CONCLUSIONS OF LAW AND DECISION"

Responding to the petitions included in the above caption[1], the Commission's Hearing Panel has issued its "Proposed Findings ... and Decision" which appears to function as an answer to the petitions, as an opposition brief as well as a recommended decision rejecting (without hearing) a number of factual averments, and denying the relief requested by petitioners in all particulars. The combined function of the Hearing Panel's document raises anew the conflicting functions and interests of the Commission and the Commission Hearing Panel.

[1]Additional petitions filed on behalf of Elmhurst Dairy, Inc., and Byrne Dairy, Inc., have been filed, and request has been made that such petitions be consolidated with Crowley Foods, etc.

I. AS INSTRUCTED BY NEW HAMPSHIRE MILK DEALERS ASSOCIATION v. NEW HAMPSHIRE MILK CONTROL BOARD, AND LIKE CASES IN STATE AND FEDERAL CONSTITUTIONAL JURISPRUDENCE, DISQUALIFICATION DUE TO CONFLICT OF INTEREST OR CONFLICT OF FUNCTIONS IS NOT OPTIONAL.

In many matters of constitutional liberty, New Hampshire — the "live free or die" state — often expresses in no-nonsense fashion the common standards to which other federal and state jurisdictions aspire. It is not surprising, moreover, that New Hampshire's has its roots in a controversy involving local milk pricing regulation. In New Hampshire Milk Dealers Association v. Milk Control Board, 107 N.H. 335 (1966), the state Supreme Court relied upon two principles of law which are particularly relevant:

1. Quasi-adjudicatory functions are involved in milk pricing promulgation[2], and
2. Any person with direct pecuniary interest in the outcome of such procedures is constitutionally disqualified.

The law as explained by New Hampshire Milk Dealers continues to guide New Hampshire Courts as shown in Appeal of Hurst, 660 A.2d 1143, 1145 (N.H. 1995)(holding that a personal relationship between administrative staff and litigant before the agency was sufficient to presumptively demonstrate constitutionally impermissible bias).

While the New Hampshire Supreme Court has applied a very practical and more lenient test of disqualification to "public officials occupying administrative positions ... on a part-time

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[2]Other jurisdictions have similarly recognized that milk pricing regulation involves quasi-adjudicatory elements: "It has previously been held that the promulgation of milk marketing orders by a Commissioner of Agriculture and Markets ... are "judicial" in nature." Western New York Milk Dealers v. Butcher, 551 N.Y.S.2d 623, 625, n. 1 (3d Dept. 1990).

basis," there is no flexibility in the ultimate rule that "a conflict of interest exists [as a matter of law] if an administrative official 'votes on a matter in which he has a direct personal or pecuniary interest.'" State Ex rel Thompson v. Board of Parole, 115 N.H. 414, 1421-22 (1975), quoting Atherton v. Concord, 109 N.H. 164, 165 (1968). See also In re State Aid Highway No. 1, Peru, Vermont, 328 A.2d 667, 670 (Vt. 1974) and Cligham v. Board of Police Commissioners, 613 A.2d 254 (Conn. 1992). These cases simply apply the federal due process requirement which recognizes that some type of interest or stake in a matter is sufficient to disqualify absolutely because the risk of bias is too great to allow rebuttal by assertions of objectivity. Moreover, Thompson instructs that direct "personal" interest may be sufficient to disqualify even if the administrative official or advisor has no direct financial stake in the outcome.

The Commission Hearing Panel, unfortunately, does not directly meet the challenge raised by petitioners. Clearly, as the Panel points out, neither any state constitution nor the federal constitution require disqualification of tribunal members simply because they are interested in the subject matter of regulation. Panel Decision at 24. The authorities relied upon by the Hearing Panel deal with the term "interest" used to mean attention, concern, or curiosity in a manner, which is permissible even if it results in predisposition. "Interest" as used in New Hampshire Milk Dealers or Gibson means legal or financial stake, which is impermissible even though it does not result in actual bias or predisposition. The Panel fails to deal with Commission member "interest" of this type.[3]

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[3]Petitioners do not necessarily seek to invalidate the Compact statute, as the Hearing Panel erroneously assumes (Panel Decision at 24). Since statutes are to be construed in a manner which will avoid constitutional infirmity, if at all possible, the apparent infirmity in application may be cured by a different application without vitiating the statute.

For purposes of identifying a presumptively disqualifying attribute of Commission members, labels purporting to identify "representative affiliation" of Commission members (Hearing Panel Decision at 2-3, 24), do little more than establish that 13 of 26 Commission members are producers or processors, and therefore have a direct pecuniary interest in the outcome, should be disqualified from voting on an over-order price or other quasi-adjudicatory matters.

The other labels such as "consumer representative" do not reveal the existence or absence of a conflict of interest, because the Compact statute neither requires the "consumer representative" to be a consumer advocate, nor establishes any standards for the representative capacity of non-producer and non-processor members. Nor, unfortunately, is there any requirement for public disclosure of "interest" by such members, where that word means legal or financial stake. As a result, so-called "consumer representatives" may include Robert Starr, one of the most effective legislative champions of Compact over-order pricing, and Chairman Wiers, who is also Chairman of the Maine Milk Commission.

The Hearing Panel's recommended decision concerning its own potential disqualification, and potential disqualification of agency staff for advisor, is equally cavalier. The Hearing Panel consists of Commission members who participated in the establishment of the contested over-order price, and are now being asked to judge the lawfulness of their own decision. The Compact statute (§ 16(B)) does not require the direct adjudicatory involvement of persons contributing to price promulgation any more than the United States Secretary of Agriculture is involved in comparable review proceedings pursuant to 7 U.S.D. § 608c(15)(A). The U.S. Secretary of Agriculture, wisely, has selected a non-involved administrative law judge and judicial officer to adjudicate handler complaints in the name of the Secretary. The Northeast Compact Commission,

unfortunately, eschewed this approach.[4]

As to participation of agency staff in the adjudication process, the Panel's decision is particularly disturbing. Some members of the agency staff have an extraordinarily personal investment in the Compact, and in maintaining over-order producer prices as high as possible as a result of many years of representing producer organizations, and relying on producer-paid salaries to secure Compact legislation.

The law does not impose exclusively upon petitioners the obligation to discover and raise undisclosed facts showing bias. Rather, those who are involved in the decision making process are expected to exercise self-discipline and disclose personal and pecuniary interests of a nature which may compel disqualification. This remains to be done by the Hearing Panel and its advisors in this case.

II. COMMENTS AND OBJECTIONS ON THE HEARING PANEL'S "FINDINGS OF FACT."

The Hearing Panel's findings of fact, like the Commission's pricing decision, reflect an inclination to assemble (and, as necessary disregard) facts to produce a desired result, rather than to examine factual material to determine the appropriate result.

Petitioners take no serious exception to the Panel's initial findings as it relates to petitioners. Petitioners and the Hearing Panel begin to part factual company, however, in paragraph 7 (Crowley findings), in which the Panel describes the make-up of the Commission. While the members of the Commission

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[4]The Panel suggest that it may avoid APA requirements because it "has chosen not to apply any APA provisions ..." Proposed Decision at 26. Since the APA is simply a codification of procedural mandates expressed by Courts, the Commission may not so easily escape the APA's underlying requirements.

designated as dairy farmers or dairy processors are not disputed, the Panel's designation of members as "consumer representatives" or other "representative affiliations" do not necessarily indicate any true affiliation or actual representation, because no affiliation standards are established by the Compact or the individual states. To petitioners' knowledge, none of the so-called consumer representatives are in any way affiliated with any consumer advocacy group, and some consumer representatives are, inconsistently, champions of high milk prices or answer to employers or constituents who are champions of high milk prices. In any event, apart from identifying dairy farmers and processors, the Commission's identification of so-called "representative affiliation" is substantively meaningless.

In an extraordinarily novel application of the law of evidence, the Hearing Panel declared "irrelevant and immaterial" allegations which tend to undermine the factual integrity of the result reached by the Commission. Panel Findings, p. 4, par. 10. The Hearing Panel refers to the Commission's decision that it "was persuaded" to base the over-order price on application of a consumer price index inflation adjustment factor applied to 1991 milk prices. However, while the CPI arithmetic was undoubtedly correct, there was absolutely no evidence before the Commission of a significant correlation between the Consumer Price Index and dairy farm milk production costs. On the contrary, every credible source of long-term production costs upon which the Commission relied — Springfield Farm Credit, University of Vermont, Cornell University, USDA, and others — reveal a pattern of milk production costs which bear a close relationship to milk prices, and no relationship to consumer prices.

The Hearing Panel erroneously characterizes the final Compact Commission rule as establishing an "over-order price of $16.94 per hundredweight." The Commission's final rule is, instead, designed to create an entry fee ($3.00 for July milk), rather than

a minimum producer price. Whether the Class I milk distributed in New England comes from Albany, New York, or Los Angeles, California, whether the price paid was $13.94 or $19.94, the July fee of $3.00 per hundredweight must be paid to the Compact Commission. The rule does not allow for any adjustment based on regulated or negotiated payments in excess of the New England zone price at the plant of origin. In proposed finding paragraph 24, the Hearing Panel states: "Under the Compact over-order price regulation, all pool plants and partially regulated plants are subject to an identical over-order price obligation, and receive identical over-order credit from the pool." This statement is inaccurate or misleading.

While the over-order Class I surcharge may be the same to similarly situated processors on each side of the New York/New England line, the distribution of producer prices or "over-order credit from the pool" is extraordinarily imbalanced, and designed to create competitive advantage for New England processors both in procurement and in distribution of milk, as shown below.[5]

In the New York milkshed, Compact-funded premiums have caused competitive prices paid by New York plants to increase in order to avoid loss of milk supplies. See Affidavit of Gary

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[5]For processing 10 million lbs./mo. Plants on either side of the New York/New England line with 80% Class I use, and equal distribution in New England and New York, payments to the Commission would be identical ($124,000), but credits from the pool would be $300,000 for the New England plant and only $62,000 for the New York plant. This is the true measure of competitive inequity created by Compact rules. This illustration assumes, to compare apples to apples, plants of same size, utilization, and distribution in the New England and New York markets. There are in fact New England-based plants, which are or have been regulated as New York-New Jersey pool plants by virtue of majority distribution in the New York market. There is likewise at least one New York based plant (Cumberland Farms) which has a substantial volume of its distribution in New England.

Dake, attached. For New England-based plants, Compact-funded producer prices have created the opportunity for reduction or elimination of competitive premiums, because the Compact producer price permits such plants to outpay their New York competitors. Thus, New England processors with distribution into New York, on which no Compact Commission over-order Class I price applies, are able to sell milk at a substantial raw milk price advantage over their New York competitors who must pay competitive premiums resulting from the competitive distortion of Compact pay-out to New York producers.

Similarly, as a direct result of Compact over-order price regulation, New York processors are placed at a competitive disadvantage not only in milk procurement, but also in distribution of packaged products, both in New York and in New England, due to higher raw product costs.

The Hearing Panel's failure to address the carefully-designed inequity in the Commission's over-order price regulations, or the economic reality of competitive distortions created by Compact pricing, reinforces petitioners' genuine concerns about conflicts of interest and conflicts of functions within the Commission and its staff.

III. COMMENTS ON PROPOSED "CONCLUSIONS OF LAW."

A. The Commerce Clause

The Commission Hearing Panel asserts, and petitioners do not dispute, that Congress may exempt states from the limitations of the Commerce Clause of the United States Constitution. And as transactions within New England, there is little question that Congress has done so.

However, Congressional consent to Commerce Clause immunity

is something which the United States Supreme Court has declared must be unambiguous. Such consent must be found reluctantly and construed narrowly.

Any Congressional exemption from the limitations of the Commerce Clause must be "unmistakably clear." United Egg Producers v. Department of Agriculture, 77 F.3d 567, 570 (1st Cir. 1996). If the requisite clarity does not appear in the text of federal legislation, it cannot be supplied by legislative history. C&A Carbone, Inc. v. Town of Clarkstown, N.Y., ___ U.S. ___, 114 S.Ct. 1677, 1692 (O'Connor, concurring).

The Supreme Court explained the reason for this requirement of express clarity in South- Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 92, 104 S.Ct. 2237, 2242-2243 (1984):

> The Commerce Clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." [citation omitted] Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." [citations omitted] On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

See also, e.g., Maine v. Taylor, 477 U.S. 131, 139 (1986)

(rejecting argument that Lacey Act Amendments, making it a federal crime to transport in interstate commerce any fish transported in violation of any law or regulation from any state, exempted Maine wildlife legislation from scrutiny under the Commerce Clause or lowered the intensity of scrutiny that would otherwise be applied); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 102 S.Ct. 3456 (1982)(rejecting argument that by approving a number of interstate compacts dealing with water rights and enacting 37 different statutes deferring to state water law, Congress had authorized the states to impose otherwise impermissible burdens on interstate commerce in ground water). Here, as set forth below, the Congressional consent makes it clear that there is no exemption from the Commerce Clause for the extra-regional actions challenged by petitioners.

The Congressional "consent" to the Compact, in its broadest restrictive condition, limits the Commission's authority by providing that it "shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area in the United States." 7 U.S.C. § 7256(7). This is, essentially, a restatement of the limitations of the negative Commerce Clause applied to the relationship between New England and the rest of the country.

The term "prohibit" in the phrase "prohibit or in any way limit" has been construed in the context of a federal marketing order "compensatory payments" to include economic trade barriers as well as physical restrictions. Lehigh Valley, supra, 370 U.S. at 97; Sani-Dairy v. Yeutter, supra, 939 F.Supp. 410, 413, aff'd, 91 F.3d at 15, 16 (3rd Cir. 1996). The Congressional prohibition against trade barriers as applied to Compact Commission pricing is far more restrictive than the prohibitions limiting similar pricing actions of the United States Secretary of Agriculture in respect to federal orders. The "in any way limit" language addressed by the Supreme Court in Lehigh applied only to milk products and not milk; only the term "prohibit" applied to milk. See Lehigh, supra, 370 U.S. at 97. Here, both terms plainly

apply to both milk products and milk; and, beyond cavil, the erection of a tariff or equalization payment at the New England border to protect the $3.00 Compact over-order price has the impermissible effect of limiting out-of-region milk sold within New England, particularly when combined with unequal distribution of Compact premiums to New York producers. This language essentially paraphrases the proscriptions of the dormant Commerce Clause in describing the commercial relationship which Congress expected to exist between the "Compact Region" and the rest of the country.

Section 147 of the FAIRA, 7 U.S., § 7256, the legislative provision constituting congressional consent to the Compact, also prohibits the use of compensatory payments in any form or for any purpose. Since the obligations which the Commission seeks to impose on plaintiffs can only be viewed as compensatory payments (see discussion, pp. 14-17, infra), they are prohibited by the terms of the Congressional consent to the Compact. As the Supreme Court stated in Cuyler v. Adams, 449 U.S. 433, 438-440, 101 S.Ct. 703, 706-707 (1981):

> The Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, provides that 'No state shall, without the Consent of the Congress ... enter into any Agreement or Compact with another State...." Because congressional consent transforms an interstate compact within this Clause into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question. [citations omitted]. .... The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of

federal authority.

See also Pievsky v. Ridge, 98 F.3d 730, 733 (3rd Cir. 1996). Thus, the scope of any Congressional consent must be strictly limited to the terms expressed by Congress. "The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." Petty v. Tennessee-Missouri Bridge Com., 359 U.S. 275, 182-282 (1959).

In interpreting the permissible scope of the compact at issue here and the validity of the rules and pricing regulations promulgated pursuant to it, this Court must examine both the language of the compact and the language of the congressional approval of the compact.[6] That examination demonstrates that those terms do not authorize the regulations challenged here. As the Supreme Court stated in Ardestani v. I.N.S., 112 S.Ct. 515, 520, 502 U.S. 129, 135-136 (U.S. 1991):

> The "strong presumption" that the plain language of the statute expressed congressional intent is rebutted only in "rare and exceptional circumstance," [citation omitted] when a contrary legislative intent is clearly expressed. [citations omitted] In this case, the legislative history cannot overcome the strong presumption "that the legislative purpose is expressed by the ordinary meaning of the words used.'" [citation omitted][7]

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[6]As the Court stated in Texas v. New Mexico, 482 U.S. 124, 107 S.Ct. 2279, 2283 (1987): "... a compact when approved by Congress becomes a law of the United States, but '[a] Compact is, after all, a contract.' [citation omitted] It remains a legal document that must be construed and applied in accordance with its terms [citation omitted]."

[7]There was no discussion of § 147 of the Farm Bill, beyond setting forth its terms, in the Conference Committee report. Since neither the House nor Senate versions of what became the 1996 Farm Bill contained a provision relating to the Northeast Dairy Compact at all, the House report contains no clarifying analysis. The comments on the floor of Congress during final passage of the Farm Bill are not sufficient to show

See also Connecticut Nat. Bank v. Germain, ___ U.S. ___, 112, S.Ct. 1146, 1149 (1992)("... in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

B. The Hearing Panel's Description of Compact §§ 9(D) and 10(7) as Alternative Means of Regulation Strives to Evade Rather than Apply Conditions and Proscriptions Expressed by Congress.

Recognizing that the Commission was unequivocally prohibited from using compensatory payments of any type, the Commission and its Hearing Panel understandably avoid reliance on § 10(7) of the Compact to justify charges on milk brought into the regulated area. The Hearing Panel emphasizes that out-of-region plants are simply required to pay the same price as fully-regulated New England plants. Panel Findings at 16. This seems to be precisely what the compensatory payment prohibition of Congress, intended to avoid.

With respect to Class I milk brought into the regulated area from outside the region the Compact authorizes the Commission to adopt ...

> Provisions requiring persons who bring Class I milk into the regulated area to make compensatory payments with respect to all such milk to the extent necessary to equalize the cost of milk purchased by handlers subject to a compact over-order price....

MGLA c. 94A App., Art. IV, § 1-10(6), Pl. App. 30, emphasis supplied.

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intent contrary to the terms of the Compact itself.

While the term "compensatory payment" is not specifically defined in the Compact, the Compact provides that terms associated with market order regulation are to be defined by the industry understanding of those terms (Compact, Art. II, § 3(b); MGLA c. 94A App., Art. II, § 1-3(b), Pl. App. 27.

As used in the federal Milk Marketing Order program, a compensatory payment may have a variety of forms and functions, but the general purpose is to protect those producers and handlers regulated under the pricing and pooling provisions of milk market regulations. This is accomplished by an assessment, partial regulation, or other effective tariff on outside milk to protect the local regulated price from being undercut by the importation of lower cost outside milk. See Conover Affidavit, Pars. 13-15, Pl. App. 5-6, and USDA's 24-market rulemaking decision of July 1964, dealing with a variety of compensatory payment provisions. Pl. App. 94-132. As described in the Report to the Secretary of Agriculture by the Federal Milk Order Study Committee (USDA, 1962)(sometimes referred to as the "Nourse Report," so named after the committee chairman, Dr. Edwin G. Nourse), "compensatory payments" may be charged to a partially-regulated processor on distribution within the regulated area, or to fully regulated processors for bulk milk received from outside sources (Pl. App. 83-94). Such payments, as described in Compact Section 10(6), are designed to equalize costs and prevent undercutting where regulated milk prices are significantly out of line with alternative competitive prices or with outside regulated prices.

Compensatory payments are based on the difference between a regulated price in the protected market, and milk prices paid or assumed to be paid for outside milk by some other measure, and may take many forms. They may be structured, for example, as the difference between the regulated price within a protected market and any of the following: (i) the surplus or Class III price, (ii) the local market blend price, (iii) the origin market blend

price, (iv) the actual cost of milk in the origin market, (v) the regulated price in the origin market, (vi) the price which would have been paid if the handler were fully regulated, or (vii) other measures described exhaustively in the Nourse Report, pp. 68-74, Pl. App. 87-93. As noted in the Nourse Report, "Compensatory payment, in essence, may be described as price barriers in lieu of any more precisely descriptive term." P. 73, n. 9, Pl. App. 92.

Although the petitioners' supporting Appendix of documents contains comprehensive references to the meaning and use of "compensatory payment" in the Federal Milk Marketing Order and judicial context, and hundreds of other resources are available to the Compact Commission, the Hearing Panel relies on nothing more than ipse dixit to assert that there is a distinction between price regulation of partially regulated plants, and equalization charges to a person bringing milk into the regulated area. Panel Decision at 16. There is no such distinction.

Rather, in the Federal Milk Order context, "compensatory payments" is simply the term of art applied to payments made by a partially regulated plant; it is the manner in which partially regulated plants are regulated. For example, the Middle Atlantic Marketing Order defines "partially regulated distributing plant" in much the same way as partially regulated plant is defined by Compact § 2(7):

> (c) "Partially regulated distributing plant" means a plant which is not a pool plant, a producer-handler plant, an other order plant, or the plant of a handler pursuant to §1004.9(e), from which fluid milk products in consumer-type packages or dispenser units are disposed of as route disposition in the marketing area during the month.

7 C.F.R. § 1004.8. Compensatory payments at the difference between the blend price and the Class I price are required, adjusted for plant location. Id. § 1004.76. "Compensatory

payment," although appearing nowhere in the text of the Code of Federal Regulations, is simply the name given to pool payments by partially regulated plants by a formula which is almost universal in the Federal Milk Order System.[8] Petitioners' App., pp. 83-132. This is not simply a matter of distinction with a subtle difference as expressed by the Panel (Findings at 16). It is a partial regulation distinction without difference, and the change to "partially regulated" plants in this case is no less a "compensatory payment" simply because the Commission has chosen another label.

C. Out-of-Region Compact Premium Payments.

As described above, perhaps the most disruptive impact of Compact Commission regulation, as applied, is distribution of variable premiums to producers in New York, while premiums within New England are uniform as to all producers. Again, recognizing that the plain language of the only Compact provision dealing with a Compact over-order price equalization pool would not permit this kind of competitive disruption, the Hearing Panel's recommended decision seeks to stretch and bend other provisions of the Compact to fit the desired result.[9] Federal and state milk regulation have long recognized two methods of distributing minimum price proceeds to producers:

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[8] See partially regulated definitions, and pool payment obligations described in the following Orders: Upper Florida, 7 C.F.R. 1006.8, 1006.76; Southeast, 1007.8 and 1007.76; and definitions and obligations described in §§ 8 and 76 of most other Federal Order Markets in the three volumes of the Code of Federal Regulations from 7 C.F.R. Part 1000 to 7 C.F.R. Part 1199.

[9] The Hearing Panel expressly disavows the notion that its producer-settlement fund is an equalization pool within the meaning of § 10(5) of the Compact. The Panel does not, unfortunately, point to express language for the type of pool it has created other than pointing to a number of sections which might fit the bill in the eyes of some beholders.

> (1) direct payment by a processor of minimum prices to the supplying producer or cooperative association based on plant use, sometimes called "individual handler pool"
> (2) payments to or through an equalization pool so that all producers receive a uniform price irrespective of handler use.

In language very similar to Compact § 10(5) the Agricultural Marketing Agreement Act also provides for both options. 7 U.S.C. § 608c(5)(B).

Although the Compact Commission has undeniably established in 7 C.F.R. § 1307.1 "one equalization pool" for redistribution of Compact over-order price revenues, the Commission Panel has yet to identify any provision of the Compact which authorizes an Orwellian result which is nearly the opposite of the pool described in § 10(5)(A).

CONCLUSIONS

Petitioners' claims are relatively simple. Congress did not extend its Commerce Clause immunity to transactions between New England and the rest of the country. Any doubt whatsoever in this regard, moreover, must be construed in favor of economic unity rather than protectionist immunity. In any event, Congress

did not consent, and cannot consent, to regulatory conduct by the Commission which treats out-of-state processors and the producers which supply them as a disfavored class in order to erect and maintain a home team competitive advantage for New England processors.

Respectfully submitted,
BLODGETT, MAKECHNIE & VETNE

By:_____

John H. Vetne
79 State Street
Newburyport, MA 01950(508)
465-3980

September 19, 1997 Attorneys for Petitioner

SUPPLEMENTAL APPENDIX B

BLODGETT, MAKECHNIE & VETNE
Attorneys at Law

[N*ames and addresses omitted in printing*]

September 21, 1997

(By FAX and 1st. Class Mail)

Rebecca Holden, Docket Clerk
43 State St.
P.O. Box 1058 Montpelier, VT 95601

Re: Administrative Petitions, Crowley Foods, etc., Nos. HEP-97-001, et seq. Notice of Errata

Dear Ms. Holden:

Petitioners recently submitted their Objections to "Proposed Findings of Fact, Conclusions of Law and Decision." I call your attention to page 8, footnote 5, of the Objections. The calculations of competitive disadvantage for the New York Processor, using July 1997 charges and pool credits, are wrong. The corrected numbers should be $128,000 pool credit to the New England plant and $51,200 pool credit to the New York plant, while both pay $120,000 to the pool. The New York plant disadvantage, therefore, is $76,800 for the month.
These corrections are also included in a revision of footnote 5, on the enclosure.

Very truly yours,

John H. Vetne
Attorney for Petitioners

cc: Michael Wiers, by FAX
Sheldon Weiss, Esq.
Bruce Krupke, NYSDFA

BEFORE THE NORTHEAST DAIRY
COMPACT COMMISSION

IN RE: PETITIONS OF CROWLEY)
FOODS, etc. (consolidated cases)) Docket No. HEP-97-001

IN RE: PETITION OF MARCUS)
DAIRY) Docket No. HEP-97-003

ERRATA

Petitioners' Objections to "Proposed Findings of Fact, Conclusions of Law and Decision" is corrected by revising the first sentence [of footnote 5] to read as follows (revisions underlined):

5/ For processing 10 million lbs./mo. during July 1997, plants on either side of the New York/New England line with 80% Class I use, and equal distribution in New England and New York, payments to the Commission would be identical ($120,000), but credits from the pool would be $128,000 for the New England plant and only $51,200 for the New York plant.

Respectfully submitted,

September 21, 1997

John Vetne
Attorney for Petitioners

SUPPLEMENTAL APENDIX C

NORTHEAST DAIRY
COMPACT COMMISSION

43 State Street
Box 1058
Montpelier, Vermont 05601

Daniel Smith, Executive Director

Officers
Michael A. Wiers, Chair P.O.
Mae C. Schmidle, Vice Chair
Mary K. Kassler, Secretary
Powell Cabot, Treasurer

NORTHEAST DAIRY COMPACT COMMISSION
MEETING
Thursday, September 25, 1997 — 9:00 a.m.
Cat N' Fiddle Restaurant — Concord, NH

Commission Members present:

Connecticut: William Brophy, Gabe Moquin (on behalf of Commissioner Ferris), Bob Jacquier, and Mae Schmidle
Maine: Fred Hardy, Thomas Doak and Michael Wiers
Massachusetts: Jim Hines (on behalf of Commissioner Healy), Mary Kelligrew Kassler, and Sam Shields
New Hampshire: Powell Cabot, Debora Erb and Bill Zweigbaum
Rhode Island: Aaron Briggs, John Smith and Ron Newman
Vermont: Andy Dykstra, Harold Howrigan and Robert Starr

Commission staff present: Dan Smith, Executive Director; Tom Lehner, Staff Counsel; and Liz Lasser, Director of Public Information.

MORNING SESSION:

Chair Michael Wiers convened the Compact Commission Meeting at 9:10 a.m.

Public Participation: No members of the public addressed the Commission.

* * * [*omitted matter*] * * *

Reports:

Chair

Mr. Wiers reviewed the hearing petitions that have been filed. He explained that the Crowley et. al. and Marcus Dairy, Inc. petitions are ready for final discussion by the Commission. In the Organic Cow petition, Mr. Wiers said that earlier in the week Organic Cow filed a petition for a protection order so that the hearing scheduled for October 1st has been cancelled and in its place a panel has been convened for October 1st on the protection order. The hearing itself will be rescheduled. Mr. Wiers added there have been two more petitions filed from Byrne and Elmhurst Dairies and that he, in consultation with the Executive Director and Staff Counsel, has elected to consolidate the two petitions into one hearing. The hearing will be before the same Administrative Panel that heard the Crowley and Marcus petitions since the issues are very similar.

* * * [*omitted matter*] * * *

Executive Session

Ms. Schmidle moved that the Commission go into Executive Session at 11:30 a.m. for the purpose of deliberating the petitions of Crowley Foods et al. and Marcus Dairy, Inc. Mr. Shields seconded the motion. Motion passed unanimously.

AFTERNOON SESSION:

Commission reconvened in open session at approximately 3:05 p.m. There was no response to a request for public participation.

Ms. Kelligrew-Kassle moved in In re Petitions of Crowley Foods, Inc., et al., HEP-97-001 "that the Commission adopt the Final Proposed Findings of Fact, Conclusion of Law and Decision of the Hearing Panel, as amended, as the Final Order of the Commission, direct legal counsel to prepare and issue the order and decision, and direct the Chair, on behalf of Commission to sign the order and decision." Ms. Schmidle seconded the motion. The motion was passed unanimously.

Mr. Jacquier moved in In re Marcus Dairy, Inc. HEP-97-003, "that the Commission adopt the Final Proposed Findings of Fact, Conclusion of Law and Decision of the Hearing Panel, as amended, as the Final Order of the Commission, direct legal counsel to prepare and issue the order and decision, and direct the Chair, on behalf of the Commission, to sign the order and decision. Mr. Dykstra seconded the motion. The motion was passed unanimously.

The meeting was adjourned at approximately 3:10 p.m.

Respectfully submitted,

Mary Kelligrew Kassler
Secretary

SUPPLEMENTAL APPENDIX D

NORTHEAST DAIRY COMPACT COMMISSION

43 State Street
Box 1058
Montpelier, Vermont 05601

Daniel Smith, Executive Director

Officers
Michael A. Wiers, Chair P.O.
Mae C. Schmidle, Vice Chair
Mary K. Kassler, Secretary
Powell Cabot, Treasurer

MINUTES OF THE DECEMBER 3, 1997 NORTHEAST DAIRY COMPACT COMMISSION MEETING TUCK LIBRARY - CONCORD, NH

Commission Members present:
Maine: Michael Wiers, Thomas Doak and Fred Hardy
Connecticut: Mae Schmidle and Shirley Ferris
Massachusetts: Jay Healy, Mary K. Kassler, Gordon Cook, Charles Arbing and Sam Shields
New Hampshire: Powell Cabot, Debora Erb and Williiam Zweigbaum
Rhode Island: John Smith, Ron Newman, Aaron Briggs and Al Bettencourt
Vermont: Robert Starr, Jacques Couture, Millicent Rooney and Andy Dykstra

Commission office personnel present: Daniel Smith, Executive Director;Tom Lehner, Staff Counsel; and Becky Holden, Office Manager.

MORNING SESSION:

Meeting called to order by Chair Michael Wiers at 10:15 a.m.

* * * [*omitted matter*] * * *

AFTERNOON SESSION:

* * * [*omitted matter*] * * *

6. Final Decision in HEP97-007 and HEP97-008 (In Re: Petitions of Elmhurst Dairy, Inc. & Byrne Dairy, Inc.

Motion was made by Mae Schmidle to go into Executive Session at 2:20 p.m. to consider Re Petitions of Elmhurst Dairy, Inc. & Byrne Dairy, Inc. (HEP-97-007 and 008). Seconded by Fred Hardy. Motion passed by unanimous vote of the six State delegations.

Returned to Regular Session at 3:05 p.m.

A motion was made by Mary K. Kassler to adopt the Findings of Fact, Conclusions of Law and Decision of the Commission and directing the staff counsel to prepare the final decision for signature by the Chair.

Seconded by John Smith. Motion passed by unanimous vote of the six State delegations; Commissioners Shirley Ferris and Charles Arbing recused themselves from consideration.

A motion was made by Ron Newman to accept the Confidential Minutes of Executive Session of September 25, 1997. Seconded by Sam Shields. Motion passed by unanimous vote of the six State delegations.

* * * [*omitted matter*] * * *

Meeting adjourned at 4:10 p.m.

Respectfully submitted,

Mary K. Kassler
Secretary

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In The

Supreme Court of the United States

CUMBERLAND FARMS, INC.,

Petitioner,

v.

NORTHEAST DAIRY COMPACT COMMISSION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY BRIEF

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

THE COMMISSION'S ASSERTION THAT PETITIONER HAS FAILED TO PRESERVE ARGUMENTS ADVANCED IN SUPPORT OF ITS PETITION IS INCORRECT.

(Reply to respondents' brief, pp. 2, 9-12)

In its Brief in Opposition, the Commission makes a number of assertions, both factual and legal, with which Cumberland Farms has already effectively taken issue in its Petition. Cumberland will not belabor those points with further argument. The Commission also raises issues concerning the identities of parties to the Petition and their counsel. *See* Commission's Brief in Opposition at 1. Cumberland has addressed those issues in correspondence to the Clerk of this Court, copies of which have been provided to all counsel. The Commission's Brief does, however, raise one new issue to which Cumberland will respond briefly.

The Commission suggests that one reason for denying the Writ in this matter is that the District Court found Cumberland's argument "that the Commission's regulation purportedly violates the dormant Commerce Clause because it does not treat partially regulated plants exactly the same as pool plants" to have been inadequately preserved. Commission's Brief in Opposition at 11. The Commission's assertion mischaracterizes both the administrative record in this matter and the District Court's opinion. In the District Court's own words, differential treatment of partially regulated plants and pool plants was precisely "the beef that generated this suit." *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission*, 26 F.Supp.2d 249, 257 (D. Mass. 1998) (Pet.

App. 56). The Court's observation reflects accurately both the prior and subsequent procedural history of the case.

Cumberland and other petitioners below have focused on the dormant Commerce Clause as a central issue from the outset. That focus is clear even in their early "Objections" to the Commission's "Proposed Findings of Fact, Conclusions of Law, and Decision," which is reproduced in the Supplemental Appendix ("Supp. App.") attached to the Petitioners' Reply Brief in *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission* (SCUS Docket No. 99-1438). Cumberland hereby incorporates that Supplemental Appendix herein by reference.

Commerce Clause issues framed the claims of Cumberland and its co-petitioners before the Commission. The Commission panel's response to the adjudicatory petitions and supporting affidavits submitted by Cumberland and others was its "Proposed Findings of Fact, Conclusions of Law, and Decision." In reply to the Commission's Proposed Findings, the petitioners before the Commission promptly filed Objections. Supp. App. 1. In their Objections, the petitioners identified the differential redistribution of compact producer prices as the factual basis for their claims. Supp. App. 6-7, 19-20. They also included the same uncontested example of competitive disadvantage adopted by the District Court and repeated by the Court of Appeals (reproduced in Cumberland's Petition at 10-11).[1]

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[1] While the Commission now insists that it told the Court of Appeals that this example is "entirely counter-factual," both the

Based on the facts as presented in their hypothetical, and on the language of the limited Congressional consent to the Compact, the petitioners argued directly to the Commission that the dormant Commerce Clause prohibited regulations that placed partially regulated plants at a competitive disadvantage. The petitioners summarized their claims by saying that, in approving the Compact, Congress did not immunize Commission pricing rules from application of the dormant Commerce Clause or from competitive discrimination scrutiny. Supp. App. 17-18.

In their opinions, both the District Court and the Court of Appeals relied on the hypothetical example that the petitioners before the Commission had used to illustrate the disparate treatment of partially regulated plants and pool plants. In that example, the differential redistribution for one month placed "the New York handler at a $76,000 competitive disadvantage." 26 F.Supp.2d at 256-57 (Pet. App. 54-55); *New York State Dairy Foods v. Northeast Dairy Compact Commission*, 198 F.3d 1, 5, n.5 (1st Cir. 1999) (Pet. App. 9).

The District Court judge correctly perceived that petitioners' "primar[y] challenge" to this discriminatory pricing feature was that it violated the Commerce Clause. 26 F.Supp.2d at 260 (Pet. App. 67). In the end, however, she concluded that the Commission's scheme for "pricing and pooling of partially regulated plants . . . is not precluded by . . . Condition 7 of the Congress' consent to

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District Court and the Court of Appeals treated it as uncontested.

the Compact, or the Commerce Clause." 26 F.Supp.2d at 262 (Pet. App. 73). For its part, the Court of Appeals observed that Cumberland's "frontal assault on the over-order pricing regime . . . [is] based on the Commerce Clause . . . " 198 F.3d at 8 (Pet. App. 16). Like the agency and District Court, the Court of Appeals understood that the Commerce Clause issues turned on "the scope of [Congress'] consent" to the Compact. *Ibid* (Pet. App. 18).

On this record, there is no basis for respondents' representation to this Court that the Commerce Clause contentions were "new" when presented to the federal District Court,[2] or that the New York processors' "primary challenge" before the agency and District Court was

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[2] The Commission's assertion that, under Compact rules, "[a] farmer in New York (outside the region) that supplies a pool [i.e., New England] plant is treated exactly like a farmer in Vermont (in the region) supplying a pool plant" is wrong. Compact rules impose specific limitations on any "dairy farmer who produces milk outside of the regulated area." 7 C.F.R. 1301.11(b); Pet. App. 192-93. These rules severely limit the ability of out-of-region farmers to receive the same benefits as their New England peers when their milk is delivered to pool plants. *Ibid.* The Commission has since limited pooled revenue benefits when milk is diverted from the pool plant to manufacturing plants near the originating farm, but "located outside of the regulated area." 7 C.F.R. 1301.23 (1998), as amended by 63 Fed. Reg. 65517 (Nov. 27, 1998). This more recent provision uniquely affects New York farms.

one of Compact statutory construction. Commission's Brief in Opposition at 8, 9-10.

Respectfully Submitted,

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